

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : FRANK JASPER PTY LTD -v- GLEW
[No 2] [2010] WASC 24

CORAM : MARTIN CJ

HEARD : 24 SEPTEMBER 2009

DELIVERED : 15 FEBRUARY 2010

FILE NO/S : CIV 2179 of 2007

BETWEEN : FRANK JASPER PTY LTD (ACN 008 810 802)
Plaintiff

AND

WAYNE KENNETH GLEW
First Defendant

GLEW TECHNOLOGIES PTY LTD
Second Defendant

Catchwords:

Misleading and deceptive conduct - Turns on its own facts

Legislation:

Fair Trading Act 1987 (WA), s 9

Rules of the Supreme Court 1971 (WA), O 4, O 12

Trade Practices Act 1974 (Cth), s 51A

Result:

Claim partially dismissed

Findings made in relation to misleading and deceptive conduct

Counterclaim dismissed

Category: B

Representation:

Counsel:

Plaintiff : Mr G R Donaldson SC & Ms W F Gillan
First Defendant : In person
Second Defendant : No appearance

Solicitors:

Plaintiff : Solomon Brothers
First Defendant : In person
Second Defendant : No appearance

Case(s) referred to in judgment(s):

Eaton Metropolitan Regional Council v Four Seasons Construction Pty Ltd
[2000] WASC 178; (2000) 22 WAR 372
Ricochet Pty Ltd v Equity Trustees Executor & Agency Company Ltd (1993)
41 FCR 229
Yorke v Lucas [1985] HCA 65; (1985) 158 CLR 661

MARTIN CJ:**Introduction**

1 The first defendant, Wayne Kenneth Glew (Mr Glew), is an inventor. He has invented systems for the supply of fuel in a vaporised form into the combustion chamber of an internal combustion engine. The systems are said to enhance fuel efficiency and reduce emissions. The inventions are the subject of four patents which enjoy varying degrees of protection under the patent laws of various countries.

2 The second defendant, Glew Technologies Pty Ltd (Glew Technologies), is a company under the control of Mr Glew and of which he is the sole director and shareholder. It was not represented at the hearing of these proceedings, although it was legally represented for a time prior to trial.

3 The plaintiff, Frank Jasper Pty Ltd (FJPL), is a company which has at all material times been under the effective control of members of the family of Mr Frank Raymond Jasper. In relation to all matters relevant to these proceedings, it was represented by either Mr Frank Raymond Jasper, or his son, who is also Mr Frank Raymond Jasper, and to whom I shall refer as Mr Jay Jasper, as that is how he is generally known.

4 In 1996, FJPL commenced investing, with others, in Mr Glew's inventions, on the basis that it would receive a share of the profits of those inventions. Between 1996 and 2007, various payments were made by FJPL to Mr Glew and/or Glew Technologies to facilitate the continuing development of the inventions and the protection of the intellectual property in them.

5 By an agreement dated 2 June 2003 (the 2003 Licence Agreement), Glew Technologies, as assignee from Mr Glew of the intellectual property rights defined in the agreement, purported to grant to FJPL an exclusive licence within the area of 'the United States of America east of the Mississippi River' (described as the east coast of the United States of America), to market, sell and use the invention, and a non-exclusive licence to manufacture devices utilising the invention anywhere in the world for sale and use within the east coast of the USA. A licence fee of \$1,000,000 was paid by FJPL to Glew Technologies by a deposit of \$200,000 paid in February 2002, and the balance of \$800,000 paid on 3 June 2003.

6 Following a breakdown in relations between the parties, these proceedings were commenced in 2007. On the pleadings as they existed at the time the matter was listed for hearing before me, the essential issues were:

- (a) Did Glew Technologies have good title to the intellectual property rights which it had purported to licence to FJPL in the 2003 Licence Agreement, and if not, could Mr Glew be compelled to transfer title to Glew Technologies in order that it could comply with its obligations to FJPL under the 2003 Licence Agreement?
- (b) Did the rights conferred upon FJPL by the 2003 Licence Agreement extend to and include rights with respect to inventions patented subsequent to the agreement, being developments and refinements of the inventions the subject of patents granted at the time of that agreement?
- (c) Was FJPL entitled to damages as a result of the misleading and deceptive conduct of Mr Glew and/or Glew Technologies in relation to the inventions the subject of the proceedings.

The hearing

7 The hearing before me was inadequately prepared and poorly presented. As a result large amounts of the allocated hearing time were lost or, in the end, wasted. Although Mr Glew did not have legal representation at the hearing, and, as I have mentioned, Glew Technologies was entirely unrepresented, it would not be fair or accurate to attribute the blame for the shambolic nature of the hearing before me to the defendants. All parties contributed to the confusion and uncertainty. Three examples will suffice to sustain this proposition.

The statement of claim

8 On the morning of the first day of the hearing, Senior Counsel for FJPL opened the case at some length. During the course of interchange with the bench, counsel foreshadowed amendments that were said to be minor in character and which would be provided overnight. Later that day, the main witness for FJPL, Mr Jay Jasper, was called and cross-examined.

9 On the morning of the second day of the hearing, a substantially revised statement of claim was presented to the court and to Mr Glew. The amendments proposed could not be characterised, on any view, as minor. They permeated the pleading. Mr Glew requested that the trial be

adjourned in order that he could consider his position in light of the proposed amendments. This request was not unreasonable, given that Mr Glew was self-represented. The second day of hearing was effectively lost.

10 On the third day of the hearing, a further revision of the statement of claim was produced to Mr Glew and to the court. The amendments proposed were less substantial than those proposed the preceding day. However, obviously Mr Glew had to be given the opportunity to consider his position in light of the amendments proposed, and the hearing was adjourned that morning while Mr Glew considered it. Upon the resumption of the hearing later that day, following interchange with the bench, Senior Counsel for FJPL acknowledged that there were still difficulties with the pleading and foreshadowed the provision of a further revised statement of claim the following day. The hearing nevertheless proceeded, and more evidence was called.

11 On the fourth (and last) day of the hearing, a further version of the statement of claim was produced to Mr Glew and to the court. I pointed out to Senior Counsel for FJPL that the problems with the pleading which had been acknowledged the previous day had not been rectified. Later in the day, the hearing was adjourned for a short while to enable Senior Counsel to again revise the pleading. Upon resumption, the amendment of the pleading as further revised was allowed, although in the closing address which followed immediately, Senior Counsel for FJPL expressly abandoned part of the case put in that amended pleading, namely, that part which asserted that the 2003 Licence Agreement had been entered into by Glew Technologies for and on behalf of Mr Glew.

The issues in respect of the 2003 Licence Agreement

12 As I have mentioned, by the express terms of the 2003 Licence Agreement, Glew Technologies, as assignee from Mr Glew, purported to licence to FJPL the intellectual property rights defined in that agreement. Those rights were defined by reference to a schedule (the second schedule), which contained reference to two patents. By the time of the hearing, a further two patents had been granted in respect of fuel delivery systems which appeared to have features in common with the systems the subject of the two patents specified in the 2003 Licence Agreement. The first issue which was presented to the court by FJPL in relation to the 2003 Licence Agreement was whether Glew Technologies had good title to the intellectual property rights which it had purported to licence to FJPL and if not, whether Mr Glew was obliged, as a term of that or some

separate agreement, to assign title to Glew Technologies, or, in the alternative, whether Mr Glew and Glew Technologies were estopped from denying that Glew Technologies had good title to the intellectual property rights and, in order to make good that estoppel, Mr Glew could be ordered by the court to assign title to Glew Technologies.

13 The second issue presented to the court by FJPL in relation to the 2003 Licence Agreement was the question of whether the licence granted pursuant to that 2003 Licence Agreement extended to, and included, not only the two patents specifically referred to in the schedule, but also the two patents which had been granted subsequent to the signing of the 2003 Licence Agreement.

14 Almost all the evidence led during the course of the hearing before me, and much of the argument addressed during the course of that hearing, concerned these two issues. However, very early during the course of the hearing it became clear, as a result of statements made by Mr Glew, that he did not dispute that Glew Technologies was the owner of the intellectual property which had been licensed to FJPL, and he believed that he had assigned all necessary rights to Glew Technologies. Further, during the course of Mr Glew's cross-examination, he expressly accepted that the 2003 Licence Agreement on its proper construction and effect, extended to and included the intellectual property rights and fuel delivery systems the subject of all four patents that had been identified, and was not restricted to the two patents expressly specified in the 2003 Licence Agreement.

15 A few days after the completion of the hearing, the court was advised that Mr Glew had executed a document in terms acceptable to FJPL assigning title in all four patents to Glew Technologies. The court was advised by FJPL that the major part of the relief sought with respect to the issues arising under the 2003 Licence Agreement was no longer necessary and was not pressed. For reasons which I will develop, it is neither necessary nor appropriate to grant any relief in relation to the 2003 Licence Agreement. It follows that most of the evidence and much of the argument presented to the court during the hearing has become irrelevant.

The scope of the issues to be determined

16 FJPL asserts that at various times between 2002 and 2007, Mr Glew, on behalf of himself and Glew Technologies, made representations with respect to the state of development of the inventions, the capacity of the systems the subject of the inventions (in terms of improving fuel efficiency and reducing emissions), and the state of the marketing

arrangements in respect of the inventions which were misleading and deceptive. FJPL asserts that in reliance upon what it characterises as the misleading and deceptive conduct of Mr Glew and/or Glew Technologies, it made various payments to facilitate the further development and intellectual property protection of the inventions between 2002 and 2007, and also entered into the 2003 Licence Agreement, pursuant to which it paid \$1,000,000 by way of licence fee. In its prayer for relief, FJPL has claimed orders for the repayment of various specific payments which it made between April 2002 and March 2007 as and by way of reimbursement of invention development and intellectual property protection costs, and in addition claimed general damages.

17 During an interlocutory hearing at which consideration was given to the directions appropriately made to enable the matter to proceed to hearing, Senior Counsel for FJPL proposed that its claim for general damages could be conveniently deferred to a subsequent hearing because that claim would require a significant body of expert evidence relating to the value of FJPL's investment in the invention and its rights under the 2003 Licence Agreement to be given. It was contended that all FJPL's claims, other than its claim for general damages, including its claim for repayment of the specific amounts which it had advanced by way of reimbursement of invention development and intellectual property protection costs could be tried at the hearing, and directions were made to that effect.

18 After considering the chronology and witness statements filed and served by FJPL in support of its case, and after hearing Senior Counsel open the case on behalf of FJPL, I put to Senior Counsel that it was impossible to segregate FJPL's claim to repayment of the amounts which it had paid by way of reimbursement of invention development and intellectual property protection costs from FJPL's claim for general damages in the way in which FJPL contended. That was because it was clear from the way in which FJPL was presenting its case that while it may well have made the payments specifically identified in its pleading in reliance upon conduct which it characterises as misleading and deceptive, the effect of those payments was to maintain its interest in the 2003 Licence Agreement with Mr Glew and/or Glew Technologies in respect of the development of the inventions, and to enhance the value of the rights which it had acquired under the 2003 Licence Agreement by reason of the development and enhancement of the inventions the subject of that agreement and the protection of the intellectual property in those inventions. Accordingly, in the way in which FJPL was presenting its case, it could not be said that it received no benefit from the payments

which it made in reliance upon the conduct, which it asserted was misleading and deceptive, and that account would have to be taken of the value of the benefits which it received by reason of making those payments before any award of damages, either specific or general, could be made.

19 Put another way, as FJPL asserted that it retained rights in respect of the inventions which had been developed as a consequence of the payments which it had made, and asserted its entitlement as licensee to the commercial exploitation of those inventions within the eastern states of the USA, it could not be said that the payments which it made in reliance upon the conduct, which it asserted was misleading and deceptive, were of no benefit or value, such that it was entitled to complete reimbursement of those amounts which it had paid as and by way of damages. Of course, the position would have been different if FJPL had presented its case on the basis that either it had no right with respect to the inventions which had been developed or enhanced as a consequence of the payments which it made, or as licensee, or that those rights were of no value, but that was not how FJPL presented its case. On its case, it seemed to me to be abundantly clear that account would have to be taken of the value derived by FJPL as a consequence of making the payments in question before any award of damages could be made.

20 Despite the evident force of this proposition, it was not acknowledged or accepted by Senior Counsel for FJPL at any point during the trial. However, on the second day of the hearing, the court was advised by Senior Counsel that FJPL was considering its position in relation to the ambit of the matters to be tried, and would advise the court of its position in due course. That advice was not provided until the presentation of closing submissions on behalf of FJPL, in which it was accepted that, at this stage, the court should go no further than make findings of fact with respect to the misleading and deceptive conduct asserted, and the payments made in reliance upon that misleading and deceptive conduct, deferring any award of damages until further evidence had been adduced to sustain the proposition that FJPL had in fact suffered loss and damage by reason of making those payments.

21 The net effect of the course followed at and after the hearing was that:

- (a) what was described by Senior Counsel for FJPL in the course of opening as the major issues in the case, being the issues relating to

the 2003 Licence Agreement, were resolved between the parties without need for judicial determination; and

- (b) in relation to the remaining issues, being the issues arising from the allegations of misleading and deceptive conduct, it is not possible for the court to go any further than make findings of fact which might provide the basis of a claim for damages in a subsequent hearing.

Factual context

22 In order to provide the context of the specific findings which I will make in respect of the conduct which is said to have been misleading and deceptive, and the payments allegedly made in reliance upon that conduct, it is appropriate for me to commence by making findings of fact in respect of the development of the commercial relationship between the parties to these proceedings. Those findings will also provide the context for the enunciation of my reasons for the view that it is neither necessary nor appropriate to grant any relief in respect of the issues raised relating to the 2003 Licence Agreement.

23 During 1994, Mr Glew applied for a patent for an invention described as an 'internal combustion engine fuel supply system'. I will describe this as the first patent. The abstract description of the invention describes it in the following terms:

An IC [internal combustion] engine fuel supply system ... having a vaporisation chamber ... which has a foam mantle ... for suspending fuel in a flow of air from a venturi inlet ... for vaporising the fuel. The vaporised fuel is mixed with the air in a mixing chamber ... and then conveyed to an intake manifold of an IC [internal combustion] engine. The system ... improves the efficiency of the combustion of the fuel and reduces the amount of pollution produced.

24 In 1995, an international application was made for protection of the invention under the provisions of the Patent Co-Operation Treaty. Application was also made for the grant of a patent relating to the invention in the United States. That application was granted in June 1998.

25 During 1996, Mr Glew demonstrated the fuel vaporisation system which he had invented to Mr Frank Jasper. The demonstration took place in a shed on the property occupied by Mr Glew in Geraldton. Mr Glew represented that the system reduced fuel consumption and also reduced pollution.

26 Some days later, Mr Frank Jasper met Mr Glew again in the same shed. Mr J White and Mr Peter Howe were also in attendance. Mr Glew offered those present the opportunity to participate in the benefits of his invention. In general terms, Mr Glew's proposal was that investors would make contributions in return for a share of the proceeds of the invention, although no contribution would be immediately required from Mr White, as he had already invested approximately \$187,000 to get the invention to its then state of development. It was therefore proposed that Mr Howe and Mr Frank Jasper would together obtain a one-third interest in the proceeds derived from the invention, in return for paying 50% of the ongoing expenses of developing the system (that is, 25% each). During the course of that meeting, Mr Glew indicated that he believed the fuel system would be fully developed within about three years.

27 Thereafter, payments were made by FJPL to either Mr Glew or Glew Technologies, or sometimes direct to patent attorneys acting in relation to the inventions. Because no claim is made for reimbursement of payments made prior to 2002, it is unnecessary to detail the particular payments made during the earlier years.

28 In April or May 2001, Mr Frank Jasper suffered a stroke, after which his health deteriorated. Thereafter Mr Jay Jasper became more significantly involved in the management of FJPL's investment in the development of the fuel supply system. However, Mr Frank Jasper remained involved.

29 During 2002, Mr Frank Jasper said to Mr Glew that he wanted to acquire a licence to commercially exploit the system within the United States of America. In February 2002, Mr Frank Jasper caused FJPL to pay a deposit of \$200,000 against the grant of such a licence. During 2002, further payments were made in respect of research and development costs incurred in developing the system.

30 As a consequence of his stroke, Mr Frank Jasper's memory is patchy. He is unable to give detailed evidence of the negotiations relating to the execution of the licence agreement in 2003. However, by at least mid-2003, negotiations had reached the point whereby it had been agreed that FJPL would pay \$1,000,000 for a licence covering the east coast of the USA.

31 During 2002, there was some alteration in the composition of the investors sharing an interest in the profits of the development of the system. That was because one of those investors, Mr White, had not

complied with the obligation to make continuing payments covering research and development costs. It appears to have been clearly understood by all concerned that failure to make payment of a relevant instalment of research and development costs would result in forfeiture of all interest in the system.

32 During 2002, Mr Glew applied for what I will describe as the second patent, being a patent covering a fuel supply system having at least some of the characteristics of the system the subject of the first patent.

The 2003 Licence Agreement

33 The 2003 Licence Agreement was executed by the parties on 2 June 2003. The parties to the agreement are Glew Technologies (described as the licensor) and FJPL (described as the licensee). The 2003 Licence Agreement was executed by Mr Glew in his capacity as a director of Glew Technologies, and bears the seal of Glew Technologies.

34 The 2003 Licence Agreement contains recitals in the following terms:

- A. Wayne Glew of Glew Technologies Pty Ltd, is the inventor of the System.
- B. The Licensor, as assignee from Wayne Glew, own [sic] the Internal Combustion Fuel Supply System and the intellectual property rights (defined as 'IPR' in clause 2.11) relating to the System.
- C. The Licensee wishes to acquire rights to IPR under licence from the Licensor to exploit the IPR in the Territory including by manufacturing and marketing the Product and by sub-licensing third parties.
- D. The Licensor has the right to grant a licence to use the IPR.
- E. The Licensor is willing to grant to the Licensee, the rights referred to in recital C to utilise the IPR.

35 The expression 'System' is defined by cl 2.20 to mean:

[T]he IC engine fuel supply system the subject of one or more of the Patents and includes the Computer as a component.

36 The expression 'Patents' is in turn defined by cl 2.16 to mean:

[A]ll classes or types of patent, patent rights, utility models, and applications therefore in respect of which the Licensor holds at the Effective Date or at any time during the Term any right, title or interest

legal or beneficial whatsoever with respect to the Products, the System and Enhancements in any country in the world and including the patents and patent applications listed in the Schedule.

37 A Schedule to the 2003 Licence Agreement details what I have described as the first and second patents.

38 Although recital B refers to the definition of 'IPR' as being contained in cl 2.11, in fact the acronym is defined by cl 2.10 to mean:

[A]ll rights and property arising and subsisting under statute, at common law and in equity in relation to Patents, Copyrights, Designs, Confidential Information, Trademarks, Know How and Circuit Layouts and the right to have trade secrets and other confidential information kept confidential and all other intellectual property rights as defined by Article 2 of the World Intellectual Property Organisation Convention of July 1967.

39 The expression 'Product' is defined by cl 2.17 to mean:

[E]ach product utilising or incorporating the System and/or any Enhancement in whole or in part and includes any product which Incorporates a Product as a component, part or sub-system.

40 The term 'Enhancement' is defined by cl 2.9 to mean:

[A]ny improvement, update, revision, modification, extension, or change, patentable or otherwise, to the system and any Product and component parts thereof, made by the Licensor or the Licensee.

41 By cl 3.1 of the agreement, the licensor grants to the licensee, subject to and conditional upon payment of the licence fee:

3.1.1 an exclusive licence for the Territory for the Term to use the IPR to market, sell and use Product in the After market within the Territory; and

3.1.2 a non-exclusive licence for the Term to Manufacture or have made Product anywhere in the world for sale and use within the Territory.

42 By the first schedule to the agreement, the expression 'Territory' is defined as 'east coast of the United States of America, east of Mississippi River'. The same schedule provides that the Term of the agreement is to be 80 years, and that the licence fee is to be an amount of \$1,000,000. By the same schedule, the 'commencement date' is described to occur by reference to cl 18, which is a handwritten clause providing that the 'effective date' (being an expression defined by cl 2.8 to mean the date by which the agreement was executed by each party) is to take effect:

[O]nce the Licensor delivers to the Licensee a copy of patents in written form, any other tangible materials comprising know how, copy of computer programmes and any relevant information as well as contract assigning intellectual property rights to Glew Technologies Pty Ltd.

43 Clause 5 of the agreement contains a covenant by Glew Technologies in the following terms:

5.1 The Licensor owns the exclusive right to exploit the IPR including the Patents listed in the Schedule. The Licensor further represents and warrants that it has full rights, power and authority to grant to the Licensee the rights granted hereunder.

44 Clause 10 of the agreement contains a covenant on the part of each of Glew Technologies and FJPL to the effect that they will promptly inform each other of any enhancement made or developed by their officers, employees, agents or subcontractors. This provision is relevant to the counterclaim, to which I will refer in due course.

45 Clause 11 contains a covenant on the part of Glew Technologies to deliver a copy of the patents to FJPL within 14 days of 'the effective date'. Clause 14.1 provides that the term of the agreement and the licence granted pursuant to its terms is to commence on the date of payment of the licence fee and to continue for a period of 80 years from that date. It follows that it is unnecessary to unravel any issues relating to the interaction between the manuscript cl 18 and the typed provisions of the agreement, as the term of the licence plainly commences upon payment of the fee.

46 On 3 June 2003, \$800,000 was paid to Glew Technologies which, together with the previous payment of \$200,000, completed the payment of the licence fee. It follows that the term of the licence commenced on 3 June 2003, and continues for 80 years from that date, unless terminated earlier.

The relief sought in respect of the 2003 Licence Agreement

47 In the prayer for relief of the statement of claim as finally amended, seven paragraphs seek relief in respect of issues connected with the 2003 Licence Agreement. In written and oral submissions, and in written advice provided to the court following Mr Glew's execution of an assignment of the first - fourth patents in terms acceptable to FJPL, FJPL has conceded that relief in the form sought in two of those paragraphs is no longer required. Those paragraphs sought specific performance and/or an injunction requiring an assignment of the relevant patents from

Mr Glew to Glew Technologies. If it is to be inferred from this concession that FJPL continues to seek relief in the forms of the other five paragraphs in the prayer for relief, no justification for the grant of relief in those terms has been provided in either the written or oral submissions advanced in support of FJPL's case. I will, nevertheless, deal specifically with each of the forms of relief sought which have not been conceded.

48 The first is a declaration to the effect that the parties to the 2003 Licence Agreement are Glew Technologies and FJPL. Relief in the form of such a declaration is entirely unnecessary. The agreement expressly provides that the parties to the agreement are Glew Technologies and FJPL. At a time when Mr Glew and Glew Technologies were both represented by legal representatives, the defence filed on their behalf admitted that the parties to the licence agreement were FJPL and Glew Technologies. If there ever was any contention in relation to the identity of the parties to the 2003 Licence Agreement, there is not any longer, and it is unnecessary and inappropriate to grant declaratory relief in respect of matters which are not contentious.

49 Relief is also sought in terms of:

A declaration that Glew Technologies holds and the defendants are estopped from denying and cannot be heard to say that the Patents and all rights of commercial value in respect of the invention described in the Patents, including all confidential information in respect of such invention and the right to apply in the future for further Patents associated with the said invention.

50 Leaving to one side the lack of syntax in, or perhaps the omission of words from the relief sought, relief in such terms would be extremely broad and, in its application to any specific circumstances, would beg a number of unresolved questions. For example, it would beg the question of whether any particular right was a right of 'commercial value in respect of the invention described in the Patents' or whether a particular item of information was 'confidential information in respect of such invention', or whether any particular future patent was, in fact, a patent 'associated with the said invention'. The uncertainty of prospective application of declaratory relief in the terms sought is a sufficient basis for its refusal.

51 Another sufficient basis for refusing the relief sought is the fact that, following the evidence given by Mr Glew and his execution of an assignment conveying all rights in all existing patents to Glew Technologies, there is no evidence of any continuing contention between the parties with respect to the ambit of the rights conveyed by the

2003 Licence Agreement to FJPL. Accordingly, as with the relief sought in the previous paragraph to which I have referred, it would be inappropriate to grant declaratory relief in an area in respect of which there is no evidence of any continuing contention between the parties.

52 A further two paragraphs of the relief sought in respect of the 2003 Licence Agreement advanced claims on the alternative basis that the parties to that agreement are Mr Glew and FJPL. As I have mentioned, any claim to that effect was specifically abandoned by FJPL through counsel during the course of closing submissions.

53 The last remaining paragraph of relief sought in respect of the 2003 Licence Agreement is a declaration to the effect that each of Mr Glew and Glew Technologies are estopped from denying that the parties to the 2003 Licence Agreement are Glew Technologies and FJPL. As I have already indicated, there is no contention otherwise, and relief in the terms sought would be unnecessary and inappropriate.

54 For these reasons, there does not appear to me to be any continuing basis upon which relief could or should be granted in respect of the issues raised relating to the 2003 Licence Agreement. I will, however, hear from the parties in relation to the orders appropriately made in respect of the costs of those issues.

The alleged misleading and deceptive conduct

55 This means that, as I have mentioned, the only matters that remain for determination arising from the hearing before me are the findings of fact to be made with respect to the alleged misleading and deceptive conduct, and the findings to be made as to whether any specific payments made by FJPL were made in reliance upon any conduct which I find to be misleading and deceptive. For the reasons I have already given, those findings cannot, of themselves, result in a judgment in any form, but can only provide a basis for relief to be granted after a further hearing.

56 I will deal with each of the representations alleged, and each payment said to have been made in reliance upon each representation in chronological order. My task is relatively straightforward, because Mr Glew did not cross-examine any of the witnesses called by FJPL to any material extent in relation to the evidence which they gave in respect of these issues. Nor did he give evidence-in-chief himself in relation to these issues, although he was cross-examined in relation to some of the representations. I will refer to that cross-examination where relevant to the representation alleged. Mr Glew also called one witness, Mr Steven

Thomas, whose evidence was relevant to some of the representations. I will refer to his evidence in relation to the particular representations to which it is relevant.

57 FJPL asserts that all relevant representations were made by Mr Glew on his own behalf and also on behalf of Glew Technologies. To the extent that I find representations were made by Mr Glew, I find that he was acting in those dual capacities. As the inventor and patent holder, he had a personal interest in the subject matter of the representations, and could not be said to be a mere conduit for the passage of information between Glew Technologies and FJPL. Glew Technologies was, in substance, his alter ego, and as I have already mentioned, he is the sole director and shareholder of that company. In the case of representations made by Mr Glew in his own regard, reliance is placed upon the provisions of the *Fair Trading Act 1987* (WA) (FTA), rather than the provisions of the *Trade Practices Act 1974*(Cth) (TPA) creating accessory liability for misleading and deceptive conduct by corporations. Accordingly, it is unnecessary to address the issues raised by the decision in *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 in relation to Mr Glew's personal liability for the representations that he made.

58 It is also clear that all representations made were in trade and commerce, and I so find.

The November 2002 representations

59 FJPL assert that some time prior to November 2002, Mr Glew stated to Mr Jay Jasper that when the system's computer was finished, Mr Glew would know how much per unit he would charge for the computer, and that in early November 2002, he represented to Mr Jay Jasper that in one month he should know the costs of the system computer, which conveyed to Mr Jay Jasper that development of the product would be complete in about one month's time.

60 Evidence as to the making of representations in these terms, and as to the meaning conveyed by the representations was given by Mr Jay Jasper. It was not challenged, nor was any evidence adduced to the contrary. I therefore find that representations were made in the terms alleged.

61 FJPL relies upon the character of the representations, being representations as to future matters, and the provisions of s 51A of the TPA, and s 9 of the FTA, which provide that the onus of proving reasonable grounds for the making of such representations rests upon the representor. As no evidence was adduced on behalf of either Mr Glew or

Glew Technologies which in any way addressed or discharged that onus, it follows that I must find that the representations were made without reasonable grounds, and were to that extent misleading and deceptive.

Payments made in reliance upon the November 2002 representations

62 FJPL asserts that two payments were made in reliance upon the November 2002 representations, namely, a payment of \$6,458.78 on 20 November 2002, and a further payment of \$12,665.89 on 10 March 2003.

63 FJPL's pleaded case, and the evidence, is to the effect that the November 2002 representations were made to Mr Jay Jasper. However, there is no evidence to the effect that the payments said to have been made in reliance upon the representations were made, or caused to be made by Mr Jay Jasper. To the extent that there is any evidence bearing upon these issues, Mr Jay Jasper's evidence is to the effect that around late 2002 he was very heavily committed to working at another business. Mr Frank Jasper gave evidence relating to the making of the two payments said to have been made in reliance upon the November 2002 representations. However, there is no evidence that Mr Jay Jasper communicated those representations to him, and Mr Frank Jasper's evidence as to the reason for making those payments makes no reference to the representations made to Mr Jay Jasper in November 2002. Accordingly, the evidence does not establish that the payments in November 2002 and March 2003 to which I have referred were made in reliance upon the November 2002 representations. FJPL's assertion to that effect must be rejected.

The first 2003 representation

64 FJPL asserts that on 2 June 2003, Mr Glew represented to Frank and Jay Jasper that development of the invention would be complete within three weeks. Mr Jay Jasper gave evidence to that effect, which was corroborated by the evidence given by Mr Frank Jasper (although not specifically as to the date upon which the representation was made). The evidence of Mr Whitehead, who was present at the meeting, was to the same effect. None of this evidence was challenged by cross-examination and, accordingly, I find that a representation was made by Mr Glew as alleged.

65 The representation was a representation as to a future matter. No evidence was adduced by Mr Glew or on behalf of Glew Technologies to the effect that there were reasonable grounds for making the

representation, so as to discharge the onus imposed by s 51A of the TPA and s 9 of the FTA. It follows that I find that the representation was made without reasonable grounds and was, to that extent, misleading and deceptive.

Payments made in reliance upon the first 2003 representation

66 FJPL asserts that payments were made in reliance upon the first 2003 representation on 25 September 2003, in the amount of \$5,205.70, 18 December 2003 in the amount of \$4,015.38, and on 12 January 2004 in the amount of \$4,582.44. Evidence to the effect that these payments were made in reliance upon the first 2003 representation, amongst other things, was given by Mr Frank Jasper. The fact that the payments were made in reliance upon other matters does not, of course, negate the causative relationship between the making of the representation and the making of the payment, provided that the representation was at least one of the causes inducing the representee to make the payment (see, for example, *Ricochet Pty Ltd v Equity Trustees Executor & Agency Company Ltd* (1993) 41 FCR 229, 235).

67 Of course, by the time these payments were made, the period of two to three weeks referred to in the first 2003 representation had long since expired. This might be thought to raise a doubt as to whether, at the time the payments were made, those representing FJPL acted reasonably in placing reliance upon the representation. However, the evidence of each of Mr Frank Jasper and Mr Jay Jasper is to the effect that, over this period, Mr Glew told them that while the system was complete, he was having difficulties with the vehicle into which the system had been fitted, which was preventing finalisation of the project. Accordingly, the evidence does not permit a finding that the asserted reliance upon the first 2003 representation was so unreasonable as to break the chain of causation. I therefore find that the payments to which I have referred were made in reliance upon the first 2003 representation.

The April 2004 representation

68 FJPL asserts that in or about April 2004, Mr Glew represented that the product developed from the invention had been tested and demonstrated 50% improved fuel economy with no increase in emissions. Evidence to the effect that Mr Glew represented that a product using the invention had demonstrated 50% improved fuel economy with 'nil emissions' was given by Mr Jay Jasper. His evidence was to the effect that he took those representations to mean that the development of the system had progressed significantly.

69 The representations with respect to improved fuel economy and 'nil emissions' having been demonstrated by testing were not representations as to future matters. Accordingly, FJPL carries the onus of proving that the representations were misleading and deceptive in those respects. There is no evidence to that effect. On the contrary, the evidence of Mr Thomas, who was called by Mr Glew, was to the effect that he tested a vehicle, a Ford Explorer, to which the system had been fitted during 2003, and that it showed no emissions and very good fuel economy. The evidence of Mr Thomas was tested by cross-examination but not shaken. I see no reason to reject that evidence, as far as it goes. It follows that I reject the contention that FJPL has discharged its onus of proving that a representation to the effect that tests showed improved fuel economy and no increase (or even zero emissions) was misleading and deceptive.

70 However, the evidence of Mr Jay Jasper was to the effect that those representations in turn conveyed to him a further representation to the effect that development of the system had progressed significantly and was substantially complete. That assertion was not tested by cross-examination and appears to be reasonable, in the context in which the representations were made, particularly in the context of the first 2003 representations. However, the evidence given by Mr Glew in cross-examination, substantiated by the uncontradicted evidence of significant claims being made upon the investors for contribution to further research and development costs after April 2004 satisfies me that the system was not substantially complete by April 2004. I further find from the evidence as a whole that the system was not substantially complete at the time of the hearing before me.

71 For these reasons I find that the representations made by Mr Glew in April 2004 reasonably conveyed to FJPL a representation to the effect that the system was substantially complete, and to that extent, Mr Glew, on his own behalf and on behalf of Glew Technologies, engaged in misleading and deceptive conduct, because the system was not then and is not now substantially complete.

Payments made in reliance upon the April 2004 representation

72 FJPL claims that payments made from 12 May 2004 in the amount of \$2,933.21 and \$7,561.78, and on 13 May 2004 in the amount of \$69,719.47 were made in reliance upon the April 2004 representation (amongst other things). Evidence to that effect was given by Mr Jay Jasper. It was not challenged in cross-examination and I see no

reason to reject it. Accordingly, I find that the payments to which I have referred were made in reliance upon the April 2004 representation.

The July 2004 representation

73 FJPL asserts that in July 2004 Mr Glew stated to Mr Jay Jasper that Vipac Engineering, a Melbourne firm, had tested the product developed from the invention and had never seen anything like the performance achieved by it, but there were no test results available because of a small problem with the computer. Evidence of a representation in these terms was given by Mr Jay Jasper. It was not challenged in cross-examination and I accept that a representation was made in those terms.

74 Because the representation was not a representation as to a future matter, FJPL carries the burden of establishing that the representation was misleading or deceptive. FJPL discharged that obligation by tendering in evidence two reports from Vipac Engineers and Scientists Ltd of Melbourne, Australia. The first report was dated 27 May 2004, and the second dated 12 July 2004. Each report presented results from testing undertaken for Glew Technologies on a Ford Falcon AU fitted with a fuel vaporiser device manufactured by Glew Technologies. Each report concluded that the testing showed that emissions did not comply with a relevantly applicable Australian Design Rule. These reports establish that the representation made by Mr Glew with respect to the testing by Vipac Engineers was misleading and deceptive, and I so find.

Payments made in reliance upon the July 2004 representation

75 FJPL asserts that in reliance upon, among other things, the July 2004 representation, payments were made on 16 March 2005 in the sum of \$14,399.45, and on or about 12 April 2005 in the amount of \$34,776.50. Evidence to this effect was given by Mr Jay Jasper. It was not challenged in cross-examination. I see no reason to reject it and accept that the payments to which I have referred were made in reliance upon, among other things, the July 2004 representation.

The November 2004 representation

76 FJPL asserts that in November 2004 Mr Glew represented to Mr Jay Jasper that he had done some testing himself on a vehicle fitted with a product embodying the invention which showed that the vehicle was achieving 50% improved fuel consumption with almost nil emissions, that there was a small glitch but 'we're almost there' which, together, conveyed the representation that development of the system derived from

the invention was either complete or substantially complete. Mr Jay Jasper gave evidence to that effect, which was not challenged by cross-examination and which I accept.

77 Because these representations were not as to future matters, FJPL carries the burden of establishing that they were misleading and deceptive. The earlier reports from Vipac Engineering to which I have referred provide evidence to that effect. That evidence is augmented by a further report from Vipac Engineers and Scientists Ltd dated 30 November 2004. That report details the results of testing carried out on 25 November 2004 of a Ford Falcon AU fitted with a fuel vaporiser device manufactured by Glew Technologies. The report sets out results and concludes that the exhaust emission test results exceeded the limits specified in an Australian Design Rule. A report of the same date records the result of fuel consumption tests also carried out by Vipac. Those tests showed an average fuel consumption, at 60 km per hour, of 7.67 litres per 100 km, and at 100 km per hour, of 9.01 litres per 100 km. Because there was no evidence on the subject of the vehicle's fuel consumption without the device fitted, it is quite possible that these tests showed significantly improved fuel consumption. Accordingly, while I am satisfied that the evidence establishes that the representation, insofar as it relates to emission levels, was misleading and deceptive, I am not so satisfied insofar as the representation relates to fuel consumption. However, I accept that the representations made also conveyed a representation to the effect that development of the system was either complete or substantially complete, which representation was misleading and deceptive for the same reasons I found a representation to similar effect made earlier was misleading and deceptive.

Payments made in reliance upon the November 2004 representations

78 The payments made on 16 March 2005, and on or about 12 April 2005 to which I have earlier referred in the context of the July 2004 representations are also said to have been made in reliance upon the November 2004 representations. Evidence to that effect was given by Mr Jay Jasper which was not challenged and which I accept. I therefore find that those payments were also made in reliance upon the November 2004 representations.

The January 2005 Vipac Engineering representation

79 FJPL asserts that on 22 January 2005, Mr Glew represented to Mr Jay Jasper and others that while a test by Vipac Engineering had not produced completed test results because mechanical and computer

components of the vehicle had failed, but that the testing nevertheless showed that the vehicle produced no emissions, and in particular no hydrocarbons, no carbon monoxide and no nitrous oxides. Evidence to that effect was given by Mr Jay Jasper and was not challenged in cross-examination. I accept that representations to that effect were made. Because the representations were not representations as to future matters, FJPL carries the burden of proving that they were misleading and deceptive. It relies upon the Vipac Engineer's reports to which I have already referred, augmented by a further report dated 6 January 2005. That report concerns the testing of an AU Ford Falcon fitted with a fuel vaporiser device manufactured by Glew Technologies. It reports the test results obtained during testing carried out on 6 January 2005 and concludes that the vehicle did not satisfy a relevantly applicable Australian Design Rule relating to emissions. I therefore find that the January 2005 Vipac Engineering representation was misleading and deceptive.

Payments made in reliance upon the January 2005 Vipac Engineering representation

80 FJPL asserts that the payments made on 16 March 2005 and on or about 12 April 2005 to which I have already referred were also made in reliance upon the January 2005 Vipac Engineering representation. Mr Jay Jasper gave evidence to that effect which was not challenged in cross-examination, and I therefore find that those payments were made in reliance upon, among other things, the January 2005 Vipac Engineering representations.

The January 2005 readiness representation

81 FJPL asserts that at the same meeting on 22 January 2005, Mr Glew represented to Mr Jay Jasper that the product developed from the invention 'works perfect', was 'finished' and 'ready now'. Evidence to that effect was given by Mr Jay Jasper. It was not challenged in cross-examination, and I find that representations were made in those terms. For the reasons I have already given in relation to representations to the effect that the development of the system was complete or substantially complete, I find that those representations were misleading and deceptive.

Payments made in reliance upon the January 2005 readiness representations

82 FJPL assert that the payments made in March and April 2005 to which I have already referred were also made in reliance upon the January 2005 readiness representations. Evidence to that effect was given by Mr Jay Jasper. That evidence was not challenged in cross-examination and I see no reason to reject it. I therefore find that the payments made in March and April 2005 to which I have already referred were made in reliance upon, among other things, the January 2005 readiness representation.

January 2004 ANZ licence representation

83 FJPL asserts that, at the meeting on 22 January 2005 to which I have already referred, Mr Glew stated to Mr Jay Jasper and others that Mr Glew and his wife would, within three months, form a company with a financier to acquire a licence to exploit within Australia and New Zealand the system the subject of the invention, and to manufacture product derived from the invention for a licence fee of \$2,000,000.

84 Evidence that a representation to this effect was made was given by Mr Jay Jasper and not challenged by cross-examination. The representation is a representation as to future matters, with the consequence that Mr Glew and Glew Technologies carry the onus of establishing reasonable grounds for making the representation.

85 Mr Glew gave no evidence-in-chief in relation to this issue, but was cross-examined upon it. His evidence was that at the time he made the representations, he believed that the finance would be provided by:

The pilot for Kerry Stokes. Rob I think his name is. I don't know his surname but Richard Whitehead would be able to tell you because he actually spoke to him. I referred him to him.

86 His evidence was that he received a 'firm proposal' verbally, from this person he knew as Rob, and whose surname he could not recall. He also stated that there was not a single document recording any proposal or communication with this prospective financier. He stated that the proposal did not proceed because two or three months later he was told by Rob that he had not been able to raise the money. This evidence falls well short of establishing reasonable grounds for making a representation to the effect that Mr Glew and his wife would, within three months, acquire a licence to exploit the system in Australia and New Zealand for a fee of \$2,000,000. Mr Glew's representation to that effect was reckless, given

the inchoate and uncertain state of the negotiations with the prospective financier of the transaction. I find that the representation was misleading and deceptive.

Payments made in reliance upon the January 2005 ANZ licence representation

87 FJPL asserts that the payments made in March and April 2005 to which I have already referred were also made in reliance upon, among other things, the January 2005 ANZ licence representation. Mr Jay Jasper gave evidence to that effect which was not challenged in cross-examination and which I accept. I therefore find that those payments were made in reliance upon, among other things, the January 2005 ANZ licence representation.

The July 2005 representation

88 FJPL asserts that in July 2005, Mr Glew stated to Mr Jay Jasper that another test to ascertain compliance with Australian Design Rules had taken place, but had not been completed because of a small mechanical glitch with the vehicle that would soon be fixed, after which the system would be completed. Mr Jay Jasper gave evidence to the effect that a representation to this effect was made, and that he took from the representation the proposition that the system was either complete or would be completed imminently. That evidence was not challenged in cross-examination and I accept it and find accordingly.

89 That part of the representation which related to the system having been tested is a representation as to a past fact. The onus of proving that part of the representation was misleading and deceptive therefore rests upon FJPL. A document was tendered in evidence bearing the manuscript 'July 05' which appears to contain test results. The source or effect of the document was not explained by any other evidence. FJPL invite me to draw an inference adverse to the defendants from the document, on the basis that they have failed to call a witness to explain its content or effect. However, I can see no reason why it would not have been equally feasible for FJPL to call a witness to give that evidence, and I decline to draw the inference proposed by FJPL. It follows that I am not satisfied that FJPL has established that the portion of the representation relating to testing was misleading and deceptive.

90 However, for the reasons given earlier, I am satisfied that a representation to the effect that the system was complete, or imminently complete, made in July 2005 was misleading and deceptive.

Payment made in reliance upon the July 2005 representation

91 FJPL asserts that in reliance upon, among other things, the July 2005 representation FJPL paid \$8,857.25 to Mr Glew and/or Glew Technologies on 27 September 2005. Evidence to this effect was given by Mr Jay Jasper and not challenged by cross-examination. I accept that evidence and find that the payment made in September 2005 was made in reliance upon, among other things, the July 2005 representation.

The January 2006 written representation

92 FJPL asserts that by a letter dated 8 January 2006, Mr Glew on behalf of Glew Technologies represented to FJPL that:

The vehicle is being prepared for hopefully the final Australian Design Rule Test in Melbourne, which should take place within the next three weeks.

93 A letter containing a representation to that effect was tendered in evidence and establishes that the representation was made.

94 The representation was a representation as to a future matter, with the consequence that Mr Glew and Glew Technologies carry the onus of proving reasonable grounds for making the representation. No evidence was tendered in any attempt to discharge that onus. No test result from Vipac Engineering or any other source dated after 2005 has been tendered in evidence. I therefore find that the representation to which I have referred was made without reasonable grounds and was, to that extent, misleading and deceptive.

Payment made in reliance upon the January 2006 written representation

95 Mr Jay Jasper gave evidence to the effect that on the same day as FJPL received the letter dated 8 January containing the representation to which I have referred, it also received an invoice from Glew Technologies in the amount of \$19,793.29. That invoice was tendered in evidence. Mr Jay Jasper gave evidence to the effect that he caused that invoice to be paid by setting off the amount due against a loan of \$30,000 FJPL had made to Mr Glew on or about 17 December 2005. A document apparently signed by Mr Glew suggesting that course was also tendered in evidence. I find that the set off to which I have referred was made in reliance upon, among other things, the January 2006 written representation.

The January 2006 oral representations

96 FJPL asserts that following receipt of the letter of 8 January 2006, Mr Jay Jasper spoke with Mr Glew, who advised him that the small problem to which reference had been made in July 2005 was a throttle body problem which had been fixed, that a small problem of phasing one computer to another would soon be fixed, and that the vehicle would soon be returned for further testing. FJPL also asserts that in the same conversation, Mr Glew represented that the product developed from the invention was finished, and that road testing was going perfectly.

97 Evidence of a conversation in which Mr Glew made representations to this effect was given by Mr Jay Jasper and not challenged in cross-examination. I have no reason to reject that evidence and therefore find that representations to that effect were made by Mr Glew. I further find that the thrust of the representation which was to the effect that the system was completed was misleading and deceptive, for reasons I have already given.

Payment made in reliance upon the January 2006 oral representations

98 Mr Jay Jasper gave evidence to the effect that the set off made in January 2006 against the loan made in December 2005 occurred in part because of his reliance upon the January 2006 oral representations. That assertion was not challenged in cross-examination and I accept that evidence and find accordingly.

The February 2006 representation

99 FJPL asserts that on or about 16 February 2006, Mr Glew stated to Mr Jay Jasper that:

I envisage we'll have certification within the next 2 to 3 weeks because I can't see a problem now. The car works perfect. It is just ironing out this tuning and that is it.

100 Evidence to that effect was given by Mr Jay Jasper and not challenged in cross-examination. I find that a representation to that effect was made.

101 That part of the representation which asserts that 'certification' would be obtained within two to three weeks was a representation as to a future matter. The onus of proving reasonable grounds for making that representation rests upon Mr Glew and Glew Technologies. No evidence was adduced in any attempt to discharge that onus and I therefore find that

part of the representation was made without reasonable grounds and was, to that extent, misleading and deceptive.

102 That part of the representation which connoted that the system was complete was also misleading and deceptive, for reasons I have already given.

Payment made in reliance upon the February 2006 representation

103 FJPL asserts in its statement of claim that in reliance upon, among other things, the February 2006 representation on 28 April 2006 a payment of \$10,206.71 was made. However, the evidence establishes that in fact on 28 April 2006 FJPL received an invoice from Glew Technologies in the amount of \$25,456.10. \$10,206.71 of that amount was satisfied by setting off the outstanding balance of the loan of \$30,000 made to Mr Glew in December 2005, and the balance of the invoice, being \$15,249.39, was paid by FJPL on 15 June 2006. I accept the evidence of Mr Jay Jasper to the effect that both the set off and the payment in June 2006 were made in reliance upon, among other things, the February 2006 representation and find accordingly.

The February 2006 option representation

104 FJPL asserts that in a written option agreement entered into on 16 February 2006, Mr Glew and Glew Technologies made certain representations as to the ownership of the patent the subject of the inventions. Those representations go only to the issues relating to the 2003 Licence Agreement, which I have already addressed above. It is therefore unnecessary to make any findings in relation to those representations.

The March 2006 representations

105 FJPL asserts that in or about March 2006 Mr Glew stated to Mr Jay Jasper that the system was being tested on Mr Glew's vehicle, that it was going perfectly and that further testing for Australian Design Rule compliance would take place at Vipac Engineering in Melbourne in April 2006.

106 Mr Jay Jasper gave evidence that Mr Glew made representations to this effect. That evidence was not challenged by cross-examination. I accept that evidence and find accordingly.

107 That part of the representation relating to future testing was a representation as to a future matter. No evidence was adduced to

discharge the onus of proving reasonable grounds for making that representation which I therefore find was, to that extent, misleading and deceptive. Further, the thrust of the representations was to the effect that the system was complete and did not require further development. For the reasons I have already given, I find that part of the representation to be misleading and deceptive.

Payments made in reliance upon the March 2006 representations

108 Mr Jay Jasper gave evidence to the effect that FJPL undertook the set off and payment of the invoice dated 28 April 2006 in reliance upon, among other things, the March 2006 representations. That evidence was not challenged by cross-examination. I accept that evidence and find accordingly.

The Toyota representation and Mercedes representation

109 FJPL asserts that in the course of a meeting in Geraldton in March 2006, Mr Glew stated to Mr Jay Jasper that negotiations were at that time taking place with Toyota in relation to the grant of a licence for the original engine manufacture market in respect of the product developed from the invention, and that Toyota was willing to pay \$100,000,000 for such a licence. FJPL further asserts that in the course of the same meeting, Mr Glew stated to Mr Jay Jasper that Mercedes was looking at using the fuel supply system in an engine it was developing for light aircraft.

110 Mr Jay Jasper gave evidence that representations to this effect were made. During cross-examination Mr Glew did not deny making representations to that effect to others, although he asserted that he could not recollect making representations to that effect in a conversation with Mr Jay Jasper. However, he did not explicitly deny making such representations to Mr Jay Jasper, and I accept the evidence of Mr Jay Jasper to the effect that such representations were made to him.

111 The representations were representations of present fact and therefore FJPL carries the onus of proving that they were misleading and deceptive. Mr Glew was cross-examined in relation to them. He stated that he had not had any discussions with anyone from Toyota but had a discussion with a Mr Trevor Manuel, a resident of Hong Kong, who told him that he was putting together a deal with Toyota. Mr Glew's evidence in this area was extremely vague and implausible. At different points during the course of cross-examination on this subject he evaded the questions put to him.

112 In relation to that part of the representation concerning dealings with Mercedes, Mr Glew again accepted that he had no direct communication with anyone from Mercedes in relation to the system. However, his evidence was that he relied upon statements made by a Mr Charles Mills-Edward to the effect that Mercedes were interested in using the product. He accepted that he had never seen any document recording any expression of interest by Mercedes.

113 Mr Glew accepted in cross-examination that he had first met Mr Mills-Edward when Mr Mills-Edward was serving a term of imprisonment following a conviction for fraud. He further accepted that although Mr Mills-Edward was a good friend, 'as far as finding him trustworthy now, Charles tends to stretch the truth a little bit' (ts 383).

114 The statements made by Mr Manual and Mr Mills-Edwards, unsupported by anything else, were an entirely insufficient basis for asserting that Toyota and Mercedes were negotiating to acquire rights to exploit the invention.

115 On the basis of the evidence given by Mr Glew in cross-examination, I find that he did not have reasonable grounds for making the Toyota and Mercedes representations which were misleading and deceptive.

Payments made in reliance upon the Toyota and Mercedes representations

116 Mr Jay Jasper gave evidence to the effect that FJPL undertook the set off and paid the balance of the invoice of 28 April 2006 to which I have already referred in reliance upon, among other things, the Toyota and Mercedes representations. That evidence was not challenged by cross-examination. I accept that evidence and find accordingly.

April 2006 meeting representation

117 FJPL asserts that during the course of a meeting held on or about 11 April 2006, in the presence of Mr Glew, Mr Jay Jasper, acting in reliance upon what he had earlier been told by Mr Glew, stated that he believed that certification of the system would be obtained in the next two to four weeks. It is further asserted that Mr Glew did not say or do anything to disagree with this assertion, and endorsed it by stating:

Yeah, well, once we are certified we really want a meeting where everybody can just get together and we can say, well right, let's party.

118 Mr Jay Jasper gave evidence that statements to this effect were made. Evidence to the same effect was given by Mr Whitehead, who recorded

the meeting. This evidence was not challenged in cross-examination, and I accept that evidence and find accordingly.

119 I find that by his conduct at the meeting, Mr Glew conveyed to those present, including Mr Jay Jasper that development of the system the subject of the inventions was complete and that certification to the effect that the system met Australian Design Rule requirements would occur very shortly. That part of Mr Glew's conduct which conveyed the representation to the effect that the system was complete was misleading and deceptive for the reasons I have already given. That part of Mr Glew's conduct which conveyed the representation that certification of the system was imminent was a representation as to a future matter. No evidence was adduced in any attempt to discharge the onus of proving reasonable grounds for making that representation. I therefore find that there were not reasonable grounds for conveying a representation to that effect, and that the representation was, to that extent, misleading and deceptive.

Payments made in reliance upon the April 2006 meeting representation

120 Mr Jay Jasper gave evidence to the effect that FJPL relied upon, among other things, the April 2006 meeting representation when undertaking the set off and making the payment to satisfy the invoice of 28 April 2006 from Glew Technologies in the total amount of \$25,456.10 to which I have already referred. That evidence was not challenged in cross-examination. I accept that evidence and find accordingly.

The April 2006 option representation

121 FJPL further asserts that by entering into a written option agreement dated 11 April 2006, certain representations were made in respect of title to the patents relating to the inventions which comprised the fuel supply system. Those representations go only to the issues concerning the 2003 Licence Agreement. It is therefore unnecessary for me to make findings in relation to them, as those issues have been resolved.

April written representations

122 FJPL asserts that by a newsletter dated 28 April 2006 sent by Mr Glew on behalf of Glew Technologies to FJPL and others, it was represented that:

Negotiations are taking place with Audi, BMW and Mercedes in relation to new car licences for those companies.

Mr Muzzo, a Japanese associate is currently negotiating with Japanese car manufacturers and when a deal is put on the table you will be informed ...

The vehicle will be ready to travel to the Eastern States leaving Perth around 10th of May for Melbourne to undergo the AFR test.

123 A newsletter dated 28 April 2006 apparently issued by Glew Technologies was tendered in evidence. It contains representations in the terms alleged. Mr Jay Jasper gave evidence to the effect that the newsletter was received by FJPL and relied upon. I therefore find that representations were made to the effect alleged.

124 Dealing firstly with the representation concerning negotiations with Audi, BMW and Mercedes, Mr Glew gave evidence to the effect that he relied entirely upon what he was told by Mr Charles Mills-Edward at the time of making that representation. He accepted that he had never seen any document from any of those companies indicating any interest in the system which he had invented. The mere assertion by a person convicted of fraud, being a person who Mr Glew accepts 'stretches the truth', unsupported by any other document or evidence provides no reasonable basis for the representation made with respect to the German car manufacturers. I therefore find that representation to be misleading and deceptive.

125 No evidence was given in relation to the negotiations by Mr Muzzo with Japanese car manufacturers. Although the assertion is, in the context of the evidence given in respect of the German car manufacturers, inherently implausible, FJPL carried the onus of proving that the representation was misleading and deceptive. In the absence of evidence on the topic, I am unable to make that finding.

126 The representation to the effect that the vehicle would be ready for further testing in Melbourne in relation to compliance with Australian Design Rules on or about 10 May 2006 was a representation as to a future matter. No evidence was adduced in order to discharge the onus of proving reasonable grounds for making that representation. I therefore find that there were not reasonable grounds for making that representation which was, to that extent, misleading and deceptive.

Payments made in reliance upon the April 2006 written representation

127 Mr Jay Jasper gave evidence that FJPL acted in reliance upon the April 2006 written representations at the time of undertaking the set off and making the payment necessary to satisfy the invoice dated 28 April

2006 and to which I have referred. That evidence was not challenged in cross-examination. I accept that evidence and find accordingly.

May 2006 representation

128 FJPL asserts that in or about May 2006, Mr Glew stated to Mr Jay Jasper that Vipac Engineering in Melbourne had delayed testing of the vehicle again, to July 2006. Mr Jay Jasper gave evidence that a representation to this effect had been made by Mr Glew. That evidence was not challenged in cross-examination. I accept that evidence and find accordingly.

129 The representation was a representation of fact, to the effect that Vipac had delayed testing. FJPL therefore carry the onus of proving that the representation was misleading and deceptive. No evidence was adduced on the topic by any party.

130 FJPL asserts that I should draw an inference adverse to the defendants based on their failure to call a witness from Vipac Engineering. However, in a circumstance in which there is simply no evidence on the subject one way or the other, this would, in effect, amount to reversing the onus of proof. Further, there does not appear to be any reason why a representative of Vipac Engineering could not have been called to give evidence on behalf of FJPL.

131 For these reasons, I conclude that FJPL has not discharged the onus of proving that the May 2006 representation was misleading and deceptive.

October 2006 representations

132 FJPL asserts that in or about September or October 2006, Mr Glew stated to Mr Jay Jasper that there were only a couple of issues to be sorted out, including wiring the computer, after which the system would be ready for testing against Australian Design Rules and, shortly thereafter, that the work had been done and that the vehicle was ready to be tuned.

133 Mr Jay Jasper gave evidence that statements to this effect were made by Mr Glew. He stated that he took the statements to convey that the vehicle was ready for testing against Australian Design Rule standards.

134 The representations were representations of present fact. The onus of proving that they were misleading and deceptive rests upon FJPL. However, FJPL adduced no evidence to establish that the work had not been done, or that the vehicle was not ready for testing against Australian

Design Rules. Accordingly, in the absence of evidence, I am unable to find that those aspects of the representations made by Mr Glew were misleading and deceptive.

135 However, in substance, the representations reiterated earlier representations to the effect that the development of the system was complete. To that extent, the representations were misleading and deceptive for the reasons I have already given.

Payments made in reliance upon the October 2006 representations

136 Mr Jay Jasper gave evidence to the effect that FJPL paid \$20,000 to Mr Glew or Glew Technologies on 14 December 2006 in reliance upon, among other things, the October 2006 representations. That evidence was not challenged in cross-examination. I accept it and find accordingly.

The December 2006 representations

137 FJPL asserts that in December 2006, Mr Glew stated to Mr Jay Jasper that the vehicle into which the system had been fitted had been tuned and would be taken to Melbourne for testing by Vipac Engineering and that the car was running perfectly. FJPL further asserts that a few days later Mr Glew represented to Mr Jay Jasper that a dummy test had been run and that the vehicle had come up clean, and that he guaranteed that the vehicle would pass the test which was shortly to be held.

138 Mr Jay Jasper gave evidence that representations to this effect were made. That evidence was not challenged in cross-examination. I accept that evidence and find accordingly.

139 FJPL asserts that the effect of the representations made was to reiterate the earlier representations made by Mr Glew to the effect that development of the system was complete. I accept that assertion and find that the representations were, to that extent, misleading and deceptive for the reasons I have already given.

Payments made in reliance upon the December 2006 representations

140 Mr Jay Jasper gave evidence that FJPL paid the amount of \$20,000 on 14 December 2006 to which I have already referred in reliance upon, among other things, the December 2006 representations. That evidence was not challenged in cross-examination. I accept that evidence and find accordingly.

The January 2007 representations

141 FJPL asserts that during the course of a meeting held in January 2007, Mr Glew stated to Mr Jay Jasper that while there was a small problem with the computer, the introduction of a new computer had fixed everything in the previous computer, and he would fix the remaining small problem. Mr Jay Jasper gave evidence that representations to this effect were made, and that after they were made he suggested to Mr Glew that the car's own computer could be used to run the fuel system. Mr Jay Jasper's evidence was that Mr Glew then suggested that he go ahead and modify the car so that it used its own computer. This evidence was not challenged in cross-examination, and I find that a conversation to this effect took place.

142 The representations made by Mr Glew were representations of present fact in relation to the status of the computers used in relation to the system. FJPL carries the onus of proving that those representations were misleading and deceptive. No evidence has been adduced by FJPL on this subject, and I am therefore unable to find that those specific representations were misleading and deceptive.

143 FJPL further assert that the effect of the representations made by Mr Glew was to convey a representation to the effect that development of the system was either complete or imminently complete. On this particular occasion, I do not accept that assertion. During December 2006, following the representations to which I have previously referred, Mr Glew told Mr Jay Jasper that the system had failed testing against Australian Design Rule standards. Further, the upshot of the conversation in January 2007 was the suggestion that Mr Jay Jasper should assume responsibility for introducing the car's own computer into the system. Given the context of the conversation, and its upshot, I do not accept that the statements made by Mr Glew conveyed a representation to the effect that development of the system was complete, or imminently complete.

144 For these reasons I conclude that the January 2007 representations were not misleading or deceptive.

Further payments made

145 Mr Jay Jasper gave evidence that on 8 March 2007 FJPL paid \$32,129.05 to patent attorneys used by Glew Technologies, and on the same day also paid \$616.75 to Glew Technologies in respect of an amount said to have been omitted from a previous invoice. I accept the evidence that those payments were made and find accordingly. Mr Jay Jasper's

evidence was to the effect that those payments were made in reliance upon, among other things, the representations made in January 2007. I have not found those representations to be misleading and deceptive. However, Mr Jay Jasper's evidence was to the effect that the payments were also made in reliance upon, among other things, all the earlier statements made by Mr Glew, most of which I have found to be misleading and deceptive.

146 The findings which I have made establish a continuing course of conduct on the part of Mr Glew and Glew Technologies which, over the course of a number of years, created a false and misleading impression as to the state of development of the system the subject of the inventions, its capabilities and its satisfaction of standards imposed by Australian Design Rules. I accept, and find, that notwithstanding the uncertainties which had emerged by the time the payments were made by FJPL in March 2007, at least part of the motivation for making those payments was reliance upon the false and misleading impression created by the earlier representations which I have found to be misleading and deceptive.

The counterclaim

147 At a time when Glew Technologies was legally represented, it filed and served a counterclaim asserting breaches of certain clauses of the 2003 Licence Agreement relating to failure to provide and exchange information about the development of the system. The counterclaim further asserts that as a consequence of those breaches, Glew Technologies issued a notice of termination pursuant to the terms of the 2003 Licence Agreement. The counterclaim seeks a declaration that the 2003 Licence Agreement had been validly terminated and damages.

148 Subsequent to the withdrawal of solicitors acting on behalf of Glew Technologies, in a number of interlocutory hearings I ruled that Glew Technologies was unable to pursue the relief sought in the counterclaim without legal representation (see *Rules of Supreme Court 1971* (WA), O 4 r 3(2), O 12 r 1(2); *Eaton Metropolitan Regional Council v Four Seasons Construction Pty Ltd* [2000] WASC 178; (2000) 22 WAR 372, 385).

149 During the course of the hearing, Mr Glew challenged my ruling. However, I reiterated my ruling for the reasons previously given. Although I was prepared to permit Mr Glew to lead evidence in support of the counterclaim, in order that the evidence would be available to an appellate court in the event that my ruling on this issue was overturned, he

advised that as a consequence of my earlier rulings, he was not in a position to lead that evidence at the hearing which had been listed.

150 For these various reasons, no evidence was led in support of the counterclaim by Glew Technologies, which must be dismissed.

Conclusion

151 For the reasons I have given, it is neither necessary nor appropriate to grant any relief in respect of the issues raised in relation to the 2003 Licence Agreement. Accordingly, that portion of FJPL's claim should be dismissed. I will, however, hear from the parties in relation to the costs of that part of the proceedings.

152 In relation to the remainder of FJPL's claim, which concerns damages for misleading and deceptive conduct, I have made findings of fact in relation to aspects of those claims. However, FJPL has not yet established any entitlement to relief based upon those findings of fact, and in particular, has not yet established that it has in fact suffered loss and damage by reason of the misleading and deceptive conduct which I have found. Following publication of these reasons, I will invite submissions from the parties as to the directions that should be made to enable a further trial of the matters remaining in issue. I will also receive any submissions from the parties in relation to the costs of that part of the proceedings to date, given that FJPL has not yet established any entitlement to relief in respect of this part of its claim. However, it is my tentative view that any ruling in respect of costs in relation to that part of the claim would be premature.