

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : FRANK JASPER PTY LTD -v- GLEW
[No 3] [2012] WASC 24

CORAM : MARTIN CJ

HEARD : 21 JUNE 2011
FURTHER WRITTEN SUBMISSIONS AND
AFFIDAVIT EVIDENCE RECEIVED ON 28 JUNE,
19 DECEMBER 2011 AND 11 JANUARY 2012

DELIVERED : 25 JANUARY 2012

FILE NO/S : CIV 2179 of 2007

BETWEEN : FRANK JASPER PTY LTD
Plaintiff

AND

WAYNE KENNETH GLEW
First Defendant

GLEW TECHNOLOGIES PTY LTD
Second Defendant

Catchwords:

Practice and procedure - Damages claim for misleading or deceptive conduct -
Erroneous inclusion of amounts in plaintiff's claim - Independent auditor's report
sufficient to correct errors - Turns on own facts

Practice and procedure - Judgments and orders - Claim for expenditure in
foreign currency - Conversion determined using rates existing at time of
expenditure

Judicial notice - Statistics published by the Reserve Bank of Australia - Exchange rate data - *Reserve Bank Act 1959* (Cth), s 85A(1)

Legislation:

Civil Judgments Enforcement Act 2004 (WA)
Commonwealth of Australia Constitution Act 1900 (Cth)
Reserve Bank Act 1959 (Cth), s 85A(1)
Supreme Court Act 1935 (WA), s 31(2)

Result:

Plaintiff awarded damages for misleading or deceptive conduct and interest

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):

BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd [2009] FCA 1448
Frank Jasper Pty Ltd v Glew [2010] WASC 24
Glew v Frank Jasper Pty Ltd [2010] WASC 87

MARTIN CJ:**Introduction**

1 I have charted the earlier history of these proceedings in reasons which I published in 2010 (*Frank Jasper Pty Ltd v Glew* [2010] WASC 24). In those reasons I explained the sequence of events which led to the resolution of issues which had been raised with respect to title to the intellectual property rights referred to in those reasons, and as to the extent of those rights. I also set out my findings with respect to the allegations of misleading and deceptive conduct, and as to the payments made in reliance upon the conduct which I found to be misleading and deceptive, and explained why those conclusions were insufficient to finally resolve the substantive claims in these proceedings. I also dismissed the counterclaim by the second defendant, Glew Technologies Pty Ltd.

2 Mr Glew's appeal from the decisions which were the subject of those reasons has been dismissed - see *Glew v Frank Jasper Pty Ltd* [2010] WASCA 87.

3 Following the publication of the reasons for my earlier decision, directions were made to facilitate the trial of the remaining issues, including directions for the exchange of expert and other evidence. Although Mr Glew attended directions hearings from time to time, he did not actively participate in the process relating to the exchange of evidence to be led at the further trial, and did not disclose any evidence which he proposed to lead pursuant to the directions which I made. Glew Technologies Pty Ltd has not been represented by a lawyer and therefore, in accordance with O 4 r 3(2) of the *Rules of the Supreme Court (WA)* and my earlier rulings, has been precluded from active participation in these proceedings. However, the plaintiff, Frank Jasper Pty Ltd, served upon Mr Glew and filed with the court the affidavits, expert reports and witness statements upon which it proposed to rely.

The hearing

4 Shortly prior to the hearing, Mr Glew filed written submissions which dealt only with the question of my authority to determine the proceedings, and which did not deal at all with any of the substantive issues in the case. When the matter came on for hearing, Mr Glew challenged my authority to determine the claims against him by reference to those written submissions. I advised Mr Glew that I found those submissions to be incomprehensible, referring, as they did, to a schedule

to the Australian Constitution which does not exist, and failing to identify any coherent basis upon which it was asserted that my appointment as a judge of the court was invalid. I advised Mr Glew that at the time of my appointment I had taken the oaths applicable to the various judicial offices which I hold in accordance with the requirements of the *Supreme Court Act 1935* (WA). I invited Mr Glew to refer me to any provision of the Australian Constitution which could support the proposition that my appointment was invalid. He was unable to identify any such provision. I therefore indicated to Mr Glew that I considered my appointment to be valid, and that I had authority to determine the case against him, and would proceed to exercise that authority.

5 At that point Mr Glew indicated that he proposed to withdraw. I advised him clearly and unequivocally that if he did withdraw, and took no further part in the proceedings, they were likely to continue in his absence, and that judgment may be entered against him (ts 502). Mr Glew nevertheless proceeded to withdraw, and took no further part in the hearing.

6 Following Mr Glew's withdrawal, evidence was led from three witnesses, Mr Frank Raymond Jasper (known as Jay Jasper), Mr David Richard Worth, and Ms Dawna Kathleen Wright. In addition, affidavits of two solicitors acting on behalf of the plaintiff were read.

Mr Jay Jasper

7 Mr Jasper's evidence took the form of a written witness statement, which he verified, and was augmented by some brief oral evidence. The evidence which he gave was logical and plausible, and although it was not tested by cross-examination, I have no reason to doubt its veracity, although in due course I came to doubt its mathematical accuracy, as I shall explain. Accordingly, I make the following findings based upon the evidence of Mr Jasper.

8 In *Frank Jasper Pty Ltd v Glew*, I identified the payments which had been made by the plaintiff to Mr Glew and/or Glew Technologies Pty Ltd, or on their behalf, in reliance upon the misleading and deceptive conduct which I found. The payments which I found had been made in reliance upon the misleading and deceptive conduct totalled \$250,046.37, and were made between 25 September 2003 and 8 March 2007. Further, as I observed:

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 [146].

9 In addition to the payments made to Mr Glew and/or Glew Technologies Pty Ltd, or on their behalf, the plaintiff incurred significant other expenditure in the testing and development of the inventions described in my earlier reasons. Those payments would not have been made if Mr Jasper had been aware of the true state of development of the system the subject of those inventions, and of the true results that had been obtained from the testing of the system.

10 Mr Jasper's written statement refers in detail to various expenses that he asserted were incurred by the plaintiff in the pursuit of the development of the system the subject of the inventions, and its exploitation in the United States, prior to the commencement of these proceedings in November 2007. Invoices, receipts, or other vouchers have been tendered in evidence in order to substantiate the items of expenditure asserted, and in most cases, the date upon which the expenditure was incurred. Mr Jasper's statement also attached a schedule which purported to set out various particulars in relation to each item of expenditure incurred, including the amount of expenditure, the currency in which the expenditure was incurred, the date upon which the expenditure was incurred and so on.

11 During the hearing I was advised by senior counsel for the plaintiff that he had been instructed 'that the most careful attention has been paid to the schedule by those who instruct me to ensure that what is in the schedule corresponds to the material in the two volumes' of receipts or other vouchers which had been tendered to substantiate the expenditure claimed (ts 505). I was then provided with another version of that schedule in which some of the claimed items of expenditure had been hatched in yellow, so as to indicate that those items of expenditure were no longer claimed because, for example, the supporting document was unintelligible or because the loss was incurred prior to the date upon which I had found the first material misrepresentation to have been made.

12 I raised the matter of interest with counsel for the plaintiff and was advised that simple interest was claimed in respect of each item of expenditure, from the date the expenditure was incurred. However, no calculation of interest computed on that basis had been performed or provided to the court. Accordingly, I directed that a further version of the schedule including a computation of the interest claimed in respect of

each item of expenditure be prepared and provided to the court and to Mr Glew, and that Mr Glew have 21 days within which to provide any submissions in response to the amended schedule (ts 522).

13 In accordance with those directions, a revised schedule was filed and served, which included a computation of simple interest, at the rate of 6 % per annum, on each item of expenditure claimed. According to that revised schedule, the total of the items of expenditure claimed over and above the amount of \$250,046.37 referred to in my earlier reasons was \$1,627,791.96, giving a total claim of \$1,877,838.33. The revised schedule also set out computations of interest claimed on the components of the total claim up to 1 February 2008, totaling \$189,092.60. Consequently, according to the revised schedule, the total amount claimed, with interest, as at 1 February 2008 was \$2,066,930.93. Interest between 1 February 2008 and the date of the hearing on 21 June 2011 was also calculated, in an amount of \$381,535.59, giving a total claim, as at the date of hearing, of \$2,448,466.52.

14 Mr Glew did not provide any material in response to the revised schedule. However, when I came to consider the schedule, and the evidence tendered in support of the schedule for the purpose of preparing these reasons, it became apparent that the materials were replete with error. The apparent errors included the maintenance of claims in respect of items of expenditure incurred prior to the earliest date upon which I had found misleading and deceptive conduct, the retention of items within the schedule which were highlighted in yellow in the schedule handed up by counsel and which should therefore have been deleted, items claimed which were unsubstantiated by any voucher or invoice, other items claimed in the schedule which were not referred to in the witness statement or in the supporting documents, duplications, double counting, errors in date, currency errors and so on. As a result, I caused my associate to write to the parties, setting out a detailed list of the apparent inaccuracies and errors and suggesting that the extent of the apparent inaccuracies and errors caused me to doubt the integrity of the schedule as a whole. At my request, my associate suggested to the parties that my confidence in any amended schedule might be restored if it were audited by a qualified auditor independent of the plaintiff.

15 The solicitors for the plaintiff advised the court that they proposed to take up the suggestion of engaging a qualified auditor independent of the plaintiff to undertake an audit of the schedule of the plaintiff's claims. In due course, the court received an affidavit of the solicitor with primary conduct of the proceedings on behalf of the plaintiff relating the steps that

had been taken to review the schedule of claims, and which included the deletion of a number of claimed items, and the engagement of Mr John Dorazio to audit the revised schedule. An affidavit by Mr Dorazio has also been filed, in which he deposes that he is a chartered accountant and registered company auditor, and that he and the accounting firm of which he is a director are independent of the plaintiff and the plaintiff's solicitors, having not previously been engaged to do work for either of them or, so far as Mr Dorazio is aware, for any person or entity related to either of them. Mr Dorazio further deposes that he undertook an audit of the claims, after which he produced a revised schedule containing only those claims which he considers to be substantiated by the materials which he audited. That schedule is attached to his affidavit.

16 According to that schedule, the items of expenditure claimed over and above the amount of \$250,046.37 the subject of my earlier reasons had been reduced to an amount of \$1,291,936.16 giving a total claim of \$1,541,982.53. In the schedule revised by Mr Dorazio, interest has been calculated on the various items of that claim up to 1 February 2008 in the total amount of \$152,967.53, giving a total claim, including interest, as at 1 February 2008 of \$1,694,950.07. Further, the revised schedule calculates interest on the outstanding principal (excluding interest) at the daily rate of \$253.48, giving a total claim for further interest for the period between 1 February 2008 and the date of hearing on 21 June 2011 of \$313,297.05. Accordingly, the total amount claimed, including interest as at the date of trial on 21 June 2011 is, according to the schedule revised by Mr Dorazio, \$2,008,247.12, together with interest from the date of hearing of \$253.48 per day.

17 The further affidavits and revised schedule were provided to Mr Glew. My associate contacted Mr Glew and requested his advice as to whether he objected to the additional affidavits and submissions, and as to whether he wished to adduce any further evidence or submissions in response, or whether he required a further hearing of the proceedings. The court has received a letter, apparently from Mr Glew, reiterating his assertion to the effect that the court lacks authority for reasons which are unintelligible, and attaching a document described as an 'affidavit of reservation of rights' which is equally unintelligible. I infer from that correspondence that Mr Glew maintains his position to the effect that he no longer wishes to actively participate in these proceedings.

18 I have carefully reviewed the schedule revised by Mr Dorazio. The apparent errors and inaccuracies which I had identified in the earlier version of that schedule have been corrected, and in most cases, the

claimed item removed or in some cases the error corrected. As the claim has now been independently audited, I am satisfied that the schedule corresponds to the expenditure which is in fact substantiated by the evidence. I am also satisfied that the computations and calculations of interest have been properly carried out.

19 A significant component of the expenditure claimed was incurred in unsuccessful attempts to test and develop the system in the United States, with a view to the exploitation of products developed using the system in that market. Those items of expenditure were incurred in US dollars. An affidavit has been provided by a solicitor employed by the plaintiff attaching a printout downloaded from the website of the Reserve Bank of Australia showing the rate of exchange between Australian and US dollars at all relevant dates. In the schedule audited by Mr Dorazio, items of expenditure incurred in US dollars have been converted into the equivalent Australian dollar amount using the exchange rate applicable at the date the expenditure was incurred as shown on the printout attached to the affidavit. I am satisfied that the exchange rate printout is statistical information contained in a publication issued by the Reserve Bank of Australia, of which this court should take judicial notice pursuant to s 85A(1) of the *Reserve Bank Act 1959* (Cth). I am also satisfied that the published rate applicable at the date the relevant item of expenditure was incurred is the appropriate exchange rate to use in order to convert expenditure incurred in US dollars into an appropriate amount of Australian currency - see *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* [2009] FCA 1448.

20 The evidence of Mr Jasper, which I accept, is to the effect that all the items of expenditure he identified were, in effect, thrown away, as the system the subject of the inventions, and the intellectual property, has no value. In order to test his assertion that the items of expenditure claimed had in fact been incurred in reliance upon the misleading and deceptive conduct which I had found in my earlier decision, I asked Mr Jasper to identify the point in time at which he came to appreciate that the system and the intellectual property were valueless. He responded to the effect that it was not until the first trial of these proceedings, which took place in 2009, when he saw Mr Glew in the witness box, that he came to appreciate that he had been completely misled, and that the system had no value (ts 516). I accept that evidence. Having regard to the fact that expenditure is only claimed up to the time at which these proceedings were commenced in November 2007, I have no reason to doubt Mr Jasper's assertion that expenditure incurred up to that date was incurred in reliance upon the misleading and deceptive conduct which I

have found, and was all, in effect, thrown away as the system is of no value.

21 I note also that no claim has been made in respect of the capital amounts paid to Mr Glew and/or Glew Technologies Pty Ltd for the interest in the intellectual property rights that was acquired by the plaintiff.

Mr David Worth

22 Mr Worth is a mechanical engineer with expertise in the design and development of engines. His evidence took the form of an expert report which he verified. In that report he set out in detail the process of reasoning which caused him to conclude that the system or systems the subject of the patents identified in my earlier reasons offered no benefit over existing fuel systems and were not viable because of their inability to satisfy emission requirements in both Australia and the United States. There is no reason to doubt Mr Worth's conclusions, which I accept.

Ms Dawna Wright

23 Ms Wright is a chartered accountant practising in the area of forensic investigation and reporting. Her evidence took the form of a written report which she verified. In that report, she set out the process of reasoning which led her to conclude that the intellectual property and the systems the subject of the intellectual property to which I referred in my earlier reasons are, and always have been, of no value. There is no reason to doubt that evidence, which I accept.

The quantum of the claim

24 I am satisfied that in reliance upon the misleading and deceptive conduct which I found to be established, the plaintiff incurred expenditure in the total amount of \$250,046.37, being the amount identified in my earlier reasons, and the further amount of \$1,291,936.16 the subject of the evidence given by Mr Jasper at the most recent hearing, and being the amount claimed in the schedule which has been revised and audited by Mr Dorazio. I am also satisfied that the plaintiff has derived no value as a consequence of those payments, and has therefore suffered loss and damage in the total amount of \$1,541,982.53.

25 Interest is claimed on the various payments to which I have referred, as and from the date the payment was made, at the rate of 6%, which is the maximum allowable under s 31(2) of the *Supreme Court Act 1935* (WA), and which has been the rate applicable to judgment sums pursuant

to s 8 of the *Civil Judgments Enforcement Act 2004* (WA) at all times material to these proceedings. There is no reason why interest should not be included as a component of the damage suffered by the plaintiff or pursuant to s 32 of the *Supreme Court Act 1935* (WA) at the rate claimed. The interest claimed has been calculated in the schedule revised and audited by Mr Dorazio, and results in interest calculated up to 1 February 2008 in the amount of \$152,967.53, and thereafter at a daily rate of \$253.48 (being the further sum of \$368,559.92 up to 25 January 2012). That leads to the conclusion that judgment should be entered, as at the date of publication of these reasons, in the amount of \$1,541,982.53 plus interest totalling \$521,527.45 giving a total sum of \$2,063,509.98. Accordingly, judgment will be entered in that amount against each of Mr Glew and Glew Technologies Pty Ltd. I will invite submissions from the parties in respect of costs.