

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

No. 2011 of 2005

BETWEEN:

ROD INVESTMENTS (VIC) PTY LTD
(ACN 079 042 970)

Plaintiff

and

WILLIAM ABEYRATNE
(AS TRUSTEE IN BANKRUPTCY OF ADAM CLARK) & ORS
(according to the Schedule attached)

Defendants

THIRD FOURTH AMENDED STATEMENT OF CLAIM
(filed pursuant to leave granted by
his the Honourable Justice Hansen on 13 June 2008-23 August 2007)

Date of Document:

16 June 2008~~28 August 2007~~

Filed on behalf of:

The Plaintiff

Prepared by:

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1. The Plaintiff brings this proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act (Victoria) 1986*.
2. This proceeding is commenced by the Plaintiff on its own behalf and on behalf of all persons who:
 - (a) by themselves, their agents or trustees, at some time during the period between 26 October 2000 and 1 September 2004 acquired an interest in shares in Media World Communications Limited (ACN 061 727 642) (formerly Werrie Gold Limited) ("MWC"); and
 - (b) suffered, or are trustees for persons who suffered, loss and damage by or resulting from the conduct of the Defendants referred to below; and
 - (c) are not:
 - (i) defendants to the proceeding;
 - (ii) parents, siblings, spouses or children of defendants;

- (iii) bodies corporate of which a defendant was an officer or majority shareholder at any time during the period (“**defendant’s company**”); or
- (iv) beneficiaries of any trust, the trustee of which is or at any time during the period was a defendant or defendant’s company;

(“**Group Members**”).

- 2A. The Plaintiff was incorporated on 24 June 1997.
- 2B. Since 24 June 1997 Andrew Gronow has been a director of the Plaintiff.
- 2C. Since 31 March 2000 the Gronow Superannuation Fund (“**GSF**”) has been a self-managed superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993 (Cth)* (“the **SIS Act**”).
- 2D. From 31 March 2000 until 4 August 2003 the trustees of the GSF were Andrew Gronow, Bronywn Gronow, Brett Gronow and Christie Gronow (“the **former GSF trustees**”).
- 2E. Since 24 June 2003 Brett Gronow has been a director of the Plaintiff.
- 2F. On or about 4 August 2003 the Plaintiff became the successor in title to the former GSF trustees as sole trustee of the GSF.

PARTICULARS

The Plaintiff was appointed trustee of the GSF by deed executed on 4 August 2003. A copy of the deed may be inspected by appointment at the offices of the Plaintiff’s solicitors.

The Defendants

- 3A. The First Defendant is and since 5 December 2007 has been the trustee in bankruptcy of Adam Clark.
- 3. ~~The First Defendant~~ (“~~Adam Clark~~”) at all material times:
 - (a) From 1 March 2004 to 5 December 2007 was ~~and is~~ a director of Media World Communications Limited (ACN 061 727 642) (*formerly* Werrie Gold Limited) (“**MWC**”);

- (b) From 20 November 1997 to 23 October 2000 was and is a director of the Sixth Defendant.
4. The Second Defendant (“**Tatoulis**”) at all material times:
- (a) From 5 December 2002 was and is a director of MWC;
 - (b) From 30 October 2000 was and is a director of Media World Broadcasting Pty Ltd (ACN 094 923 725) (subject to deed of company arrangement) (“**MWB**”).
5. The Third Defendant (“**Ramsden**”) at all material times:
- (a) From 5 December 2002 was and is a director of MWC;
 - (b) From 30 October 2000 was and is a director of MWB;
 - (c) From 22 March 2000 was and is a director of the Seventh Defendant.
6. The Fourth Defendant (“**Velik**”) at all material times:
- (a) From 1 March 2004 until 21 June 2004 was a director of MWC;
 - (b) From 27 May 2004 to 21 June 2004 was a director of MWB;
 - (c) From 20 November 1997 to 8 September 2004 was a director of the Sixth Defendant.
7. The Fifth Defendant (“**Graeme Clark**”) at all material times:
- (a) From 1 March 2004 was and is a director of MWC;
 - (b) From 25 July 2000 was and is a director of Adam 12;
 - (c) From 20 November 1997 was and is a director of the Sixth Defendant;
 - (d) Is the father of Adam Clark.
8. The Sixth Defendant (“**WAPPL**”) at all material times was and is:
- (a) A corporation registered pursuant to the *Corporations Law* and/or *Corporations Act* and capable of being sued;
 - (b) Carrying on business of, inter alia, procuring investment in and offering licences to use and develop technology for the compression, storage, transmission and reproduction of data (“**streaming**”) known as “Adams Platform technology” (“**APT**”);
 - (c) Carrying on the said business in trade or commerce within the meaning of:
 - (i) section 12DA of the *Australian Securities and Investments Commission Act 2001 (Cth)* (“**ASIC Act**”); and
 - (ii) the *Fair Trading Act 1999 (Vic)* (“**FTA**”).

9. The Seventh Defendant (“**Terrain**”) at all material times was and is:
- (a) A corporation within the meaning of the *Corporations Law* and/or *Corporations Act* and capable of being sued;
 - (b) Carrying on business of ~~providing investment advice~~ advisory services relating to corporate structuring, financing and capital raising;
 - (c) Carrying on the said business in trade or commerce within the meaning of:
 - (i) section 12DA of the ASIC Act; and
 - (ii) the FTA.
10. The Eighth Defendant (“**Tolly Group**”) at all material times was and is:
- (a) Incorporated pursuant to the laws of the United States of America (“**USA**”);
 - (b) Carrying on a business in the USA and elsewhere including Australia of providing third party validation services including, inter alia, certification, research and testing of information technologies;
 - (c) Carrying on the said business in Australia in trade or commerce within the meaning of:
 - (i) the *Trade Practices Act 1976* (“**TPA**”);
 - (ii) section 12DA of the ASIC Act; and
 - (iii) the FTA.
11. The Ninth Defendant (“**Adam 12**”) at all material times was and is:
- (a) A corporation registered pursuant to the *Corporations Law* and/or *Corporations Act 2001* and capable of being sued;
 - (b) A trading corporation within the meaning of the TPA;
 - (c) Carrying on business of, inter alia, procuring investment in and offering licences to use and develop APT;
 - (d) Carrying on the said business in trade or commerce within the meaning of:
 - (i) section 12DA of the ASIC Act; and
 - (ii) the FTA.

11A. The Tenth Defendant (“**Kevin Tolly**”) at all material times was and is a director of Tolly Group.

APT Representations

12. From in or about early 2000 until 22 September 2004 Adam Clark, WAPPL and Adam 12 (together and severally “the **Clark Parties**”), and Graeme Clark and Velik, and each of them, represented to persons investing or considering investing in ventures for the commercial development of APT (“**APT Investors**”) that, or to the effect that:
- (a) APT was new technology invented by Adam Clark;
 - (b) APT was revolutionary or miraculous new technology;
 - (c) APT used new CODEC (compression/decompression) algorithms;
 - (d) APT was able to compress digitally-stored data by a ratio of up to 1000:1;
 - (e) APT was able to deliver full-screen, broadcast- or DVD-quality video and CD-quality audio to be transmitted in real time across standard 28.8Kbps modem and copper-wire telephone lines;
 - (f) APT had potential applications in telecommunications and computing; and
 - (g) The potential applications of APT were immense;
- (together and severally “the **APT Representations**”).

PARTICULARS

The APT Representations were partly in writing and partly oral. In so far as they were in writing and were made to the former GSF trustees and the Plaintiff, they were made in the documents referred to in paragraph 71(a) below. In so far as the APT Representations were oral and made to the former GSF trustees and the Plaintiff the representations were made by the Clark Parties, Graeme Clark and Velik as follows:

- (i) ~~to Andrew Gronow~~ at the lunches, meetings and presentations referred to in paragraph 71(b) below; and
- (ii) to Ramsden, Tatoulis, Terrain and Peter Graham, the stockbroker engaged by the former GSF trustees, who communicated the representations to Andrew Gronow during the conversations referred to in paragraph 71(b)(iii) below.

Further particulars will be provided following the completion of discovery. Particulars relating to each Group Member will be provided following the trial of common questions or otherwise as the Court may direct.

13. By making the APT Representations and each of them, the Clark Parties, Graemie Clark and Velik engaged in conduct:
- (a) In relation to dealing in securities within the meaning of section 995 of the *Corporations Law* and section 995 of the *Corporations Act* as in effect until 11 March 2002 (“the **Corporations Act 2001**”);
 - (b) In relation to a financial product or a financial service within the meaning of section 1041H(1) of the *Corporations Act* as in effect from 11 March 2002 (“the **Corporations Act 2002**”);
 - (c) In trade or commerce, in relation to financial services, within the meaning of section 12DA(1) of the ASIC Act;
 - (d) In trade or commerce within the meaning of section 9 of the FTA; and
 - (e) In trade or commerce, and as to the nature or characteristics of services, within the meaning of section 11 of the FTA.
14. Contrary to the APT Representations:
- (a) APT was not new technology invented by Adam Clark;
 - (b) APT was not revolutionary or miraculous new technology;
 - (c) APT did not use new CODEC algorithms;
 - (d) APT was not able to compress digitally-stored data by a ratio of up to 1000:1;
 - (e) APT was not able to deliver full-screen, broadcast- or DVD-quality video and CD-quality audio to be transmitted in real time across standard 28.8Kbps modem and copper-wire telephone lines;
 - (f) APT did not have potential applications in telecommunications and computing;
 - (g) The potential applications of APT were not immense.

PARTICULARS

- (i) APT used outdated and naïve techniques to compress video and its shortcomings would prevent it from achieving the performance claimed for it;
- (ii) the majority of the files forming part of the APT encoding or decoding process were copied from other commercially-available programs and re-named to appear as part of APT;
- (iii) the files forming part of the APT encoding or decoding process did not represent a unique and legitimate compression technology; and

- (iv) a number of files forming part of APT were “reference movie files” which would create the appearance that streaming of video was occurring when in fact it was not.

~~Further particulars will be provided following the completion of discovery.~~

15. Further, in so far as the APT Representations referred to in paragraph 12(d) to (g) inclusive were representations as to future matters within the meaning of:
- (a) Section 765 of the *Corporations Law*;
 - (b) Section 769C(1) of the *Corporations Act*;
 - (c) Section 12BB of the ASIC Act; or
 - (d) Section 4 of the FTA;
- the Clark Parties, Graeme Clark and Velik did not have reasonable grounds for making them.

PARTICULARS

- (i) Adam Clark, WAPPL and Adam 12 knew the matters in paragraphs (i) to (iv) inclusive of the particulars under paragraph 14 above.
- (ii) The source codes and CODEC algorithms contained in APT had not been permitted to be examined by independent experts. Prior to September 2003 independent experts had only been permitted to observe purported demonstrations of APT. Those observations were done by CTIE/Monash University (“**Monash**”) and the Commonwealth Scientific and Industrial Research Organisation (“**CSIRO**”) in or about December 2000 and August 2002 respectively.
- ~~(iii)~~ In and from September 2003 the examination of APT by Tolly Group Tolly did not involve:
 - (A) examination or adequate examination by Tolly Group Tolly of the source codes or CODEC algorithms used by APT; or
 - (B) the testing, observation or demonstration of APT in an environment (“test bed”) which did not contain hidden files.
- (iv) Adequate independent expert examination of the source codes or CODEC algorithms would have revealed that, inter alia:

- (A) APT comprised or included source code taken from other commercially available compression software which had been renamed to appear as APT code; and
- (B) ~~APT included the test bed contained~~ “reference” movie files which operated to create the appearance that video was being streamed when it was not.

~~Further particulars will be provided following the completion of discovery.~~

16. At no time prior to 22 September 2004 did the Clark Parties, Graeme Clark or Velik take any, or any adequate, steps to correct or withdraw the APT Representations.
17. By reason of the matters set out in paragraph 14 and paragraph 15, by making the APT Representations each of the Clark Parties, Graeme Clark and Velik engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of:
 - (a) Section 995 of the *Corporations Law*, further or alternatively section 995 of the *Corporations Act 2001*;
 - (b) Section 1041H of the *Corporations Act 2002*;
 - (c) Section 12DA of the ASIC Act;
 - (d) Section 9 of the FTA; and
 - (e) Section 11 of the FTA.
18. Further and in the alternative, each of the Clark Parties, Graeme Clark and Velik:
 - (a) Aided, abetted, counselled or procured;
 - (b) Induced; or
 - (c) Was knowingly concerned in;
 the contraventions referred to in paragraph 17 within the meaning of:
 - (i) section 79 of the *Corporations Law*;
 - (ii) section 79 of the *Corporations Act*;
 - (iii) the ASIC Act; and
 - (iv) section 145 of the FTA.

PARTICULARS

The Plaintiff refers to and repeats the particulars under paragraph 15 above.

Further, each of the Clark Parties, Graeme Clark and Velik participated in:

- A. arranging and holding meetings with APT Investors (including MWB and MWC) including:
- (a) meetings with Tatoulis and Ramsden from about mid 2000 to early 2001 in relation to the negotiation of a licence agreement between WAPPL and Media World Pty Ltd, a film production company controlled by Tatoulis, or an entity nominated by Media World Pty Ltd;
- (b) the demonstrations to investors particularised under paragraph 40 below;
- B. arranging and giving interviews with newsmedia representatives in relation to APT;
- C. the preparation of reports about APT including the reports referred to in paragraph 71(a) below; and
- D. arranging and conducting presentations about and demonstrations of APT including the presentations and demonstrations referred to in paragraph 71(b) below.

~~Further particulars will be provided following the completion of discovery.~~

19. By reason of the matters referred to in paragraph 18, the Clark Parties, Graeme Clark and Velik were involved in the contraventions referred to in paragraph 17, within the meaning of:
- (a) section 79 of the *Corporations Law*;
- (b) section 79 of the *Corporations Act*;
- (c) the ASIC Act; and
- (d) section 145 of the FTA.
20. Further and in the alternative, at all material times the Clark Parties knew that:
- (a) APT was not new technology invented by Adam Clark;
- (b) APT was not revolutionary or miraculous new technology;
- (c) APT did not use new CODEC algorithms;
- (d) APT was not able to compress digitally-stored data by a ratio of up to 1000:1;
- (e) APT was not able to deliver full-screen, broadcast- or DVD-quality video and CD-quality audio to be transmitted in real time across standard 28.8Kbps modem and copper-wire telephone lines;
- (f) APT did not have potential applications in telecommunications and computing;

- (g) The potential applications of APT were not immense;
- (h) APT used outdated and naïve techniques to compress video and its shortcomings would prevent it from achieving the performance claimed for it;
- (i) The files forming part of the APT encoding or decoding process comprised or included files copied from other commercially-available programs and re-named to appear as part of APT;
- (j) The files forming part of the APT encoding or decoding process did not represent a unique and legitimate compression technology;
- (k) A number of files forming part of APT were “reference movie files” which would create the appearance that streaming of video was occurring when in fact it was not;
- (l) The source codes and CODEC algorithms contained in APT had not been permitted to be examined by independent experts;
- (m) In and from September 2003 – the examination of APT by Tolly Group Tolly did not involve examination or adequate examination by Tolly Group Tolly of the source codes or CODEC algorithms used by APT;
- (n) The Clark Parties, Graeme Clark and Velik did not have reasonable grounds for making the APT Representations.

PARTICULARS

The source codes and files comprising APT comprised elements of code from other commercially-available compression software, collected and collated by Adam Clark and renamed by him to appear as new code. The Plaintiff refers to and repeats the particulars under paragraph 14 and paragraphs (ii) to (iv) of the particulars under 15. ~~Further particulars will be provided following the completion of discovery.~~

- 21. Prior to 22 September 2004 the Clark Parties took no or no adequate step to inform APT Investors of, and remained silent about, the matters set out in paragraph 20 (“the **Clark APT Silence**”).
- 22. By reason of the matters set out in paragraphs 14, 15 and 20, by engaging in the conduct referred to in paragraph 21 the Clark Parties engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of:
 - (a) Section 995 of the *Corporations Law*, further or alternatively section 995 of the *Corporations Act*;
 - (b) Section 1041H of the *Corporations Act*;

- (c) Section 12DA of the ASIC Act;
- (d) Section 9 of the FTA; and
- (e) Section 11 of the FTA.

MWB Representations

23. Prior to 26 October 2000 the Clark Parties, Graeme Clark and Velik made the APT Representations to Tatoulis, Ramsden and Terrain.

PARTICULARS

The representations were made during discussions in or about October 2000 between Adam Clark, Graeme Clark and Velik on behalf of WAPPL and Tatoulis and Ramsden, during which the performance characteristics and potential commercial applications of APT were described by the WAPPL representatives to Tatoulis and Ramsden.

24. By an agreement dated 26 October 2000, WAPPL agreed to grant to MWB, a person nominated by MWB Media World Pty Ltd, a licence to use APT in internet broadcasting.

PARTICULARS

The agreement is set out in a letter from WAPPL to Tatoulis and Ramsden dated 26 October 2000. Further particulars will be provided following the completion of discovery.

25. On or about 9 February 2001:
- (a) WAPPL granted to MWB a licence to use APT in internet broadcasting (“the **WAPPL Licence**”); and
 - (b) MWB acquired, or the Clark Parties and MWB agreed that MWB would acquire, a 25% interest in:
 - (i) a company licensing APT in Australia (“the Australian Management Company” or “**AMC**”); and
 - (ii) a company licensing APT outside Australia (“the International Management Company” or “**IMC**”).

PARTICULARS

The WAPPL Licence is in writing dated 9 February 2001. Further particulars will be provided following the completion of discovery.

26. From on or about 26 October 2000 or its date of incorporation, whichever is later in each case, until 22 September 2004 (“the **Promotion Period**”) each of Tatoulis, Ramsden, Terrain and MWB represented to APT Investors that, or to the effect that:
- (a) APT was new technology;
 - (b) APT was world-breaking technology;
 - (c) APT could replace existing standards for digital compression;
 - (d) APT used new compression algorithms to compress raw video data by a ratio of approximately one thousand times prior to transmission of the video data and then by a further one thousand times for the purposes of transmission of the video data;
 - (e) APT enabled video to be sent across copper wire telephone lines;
 - (f) APT enabled video to be sent across copper wire telephone lines as live transmission; and
 - (g) APT opened the way for video-on-demand “(VOD)” and live sports broadcasts through the internet;
- (together and severally “the **MWB Representations**”).

PARTICULARS

The MWB Representations were partly in writing and partly oral.

In so far as they were in writing and were communicated to the former GSF trustees and the Plaintiff they were made in:

- a. document titled “Media World Broadcasting Limited – Company Presentation” dated August 2001;
- b. a letter to MWB shareholders signed by Ramsden and dated 4 February 2002;
- c. a document titled “Media World Broadcasting Ltd – Company Technical Presentation” dated 13 February 2002;
- ~~b. the MWC ASX Announcement dated 12 June 2002; and~~
- e.d. a document titled “Media World Broadcasting – Company Information Summary” dated October 2002;

copies of which may be inspected by appointment at the offices of the Plaintiff's solicitors.

In so far as the MWB Representations were oral and communicated to the former GSF trustees and the Plaintiff they were made by:

- i. Ramsden, Tatoulis and by officers, servants or agents of MWB or Terrain at the lunches, meetings and presentations referred to in paragraph 71(b) below; and
- ii. Ramsden, Tatoulis and by officers, servants or agents of MWB or Terrain to Peter Graham and communicated by him to Andrew Gronow as director of the Plaintiff and a former GSF trustee during the conversations referred to in paragraph 71(b)(iii) below.

~~Further particulars will be provided following the completion of discovery.~~

Particulars relating to each Group Member will be provided following the trial of common questions or otherwise as the Court may direct.

27. By making the MWB Representations and each of them, each of Tatoulis, Ramsden, Terrain and MWB engaged in conduct:
 - (a) In relation to dealing in securities within the meaning of section 995 of the *Corporations Law* and section 995 of the *Corporations Act 2001*;
 - (b) In relation to a financial product or a financial service within the meaning of section 1041H(1) of the *Corporations Act 2002*;
 - (c) In trade or commerce, in relation to financial services, within the meaning of section 12DA(1) of the ASIC Act;
 - (d) In trade or commerce within the meaning of section 9 of the FTA; and
 - (e) In trade or commerce, and as to the nature or characteristics of services, within the meaning of section 11 of the FTA.

28. Contrary to the MWB Representations:
 - (a) APT was not new technology;
 - (b) APT was not world-breaking technology;
 - (c) APT could not replace existing standards for digital compression;
 - (d) APT did not use new compression algorithms to compress raw video data by a ratio of approximately one thousand times prior to transmission of the video data and