FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v GetSwift Limited (Liability Hearing) [2021] FCA 1384

File number: VID 146 of 2019

Judgment of: **LEE J**

Date of judgment: 10 November 2021

Catchwords: **CORPORATIONS** – the GetSwift saga – story of the rise and fall of a nascent 'tech start up' listed on the ASX – market offering 'software as a service' – purported 'exclusive multi-year' agreements with 13 Enterprise Clients – underlying facts reveal agreements far less than certain – focus on influencing market perceptions through 'price sensitive' ASX announcements – 'do or die' approach to success – "[b]it by bit until we get to a $7.50 share price :)" – company re-domiciled to Canada during currency of regulatory proceeding

PRACTICE AND PROCEDURE – pleadings in continuous disclosure cases – leave sought to rely on a fifth further amended statement of claim – whether the Australian Securities and Investments Commission ran an 'all or nothing' case – whether one sub-element of an omitted category of information can undermine the combined total – not an 'all or nothing case' – rejection of amended pleading – same case as was always run – no prejudice to GetSwift

CORPORATIONS – elephantine continuous disclosure case – consideration of continuous disclosure obligations – s 674 of the *Corporations Act 2001* (Cth) – ASX Listing Rule 3.1 – where listed public company announced to market that it had entered into 'exclusive multi-year' agreements – whether information about trial periods, termination and other qualifying aspects material – need to wade through factual narrative of each of the 13 Enterprise Clients – prodigious documentary case – all contraventions made out

CORPORATIONS – materiality of omitted information – *ex ante* analysis – influence of expert and lay evidence – identity of relevant investors – consideration of how relevant investors determine whether to acquire or dispose of securities – consideration of what influences investors in deciding whether to acquire or dispose of securities – consideration of share price in *ex ante* analysis –

consideration of subjective views of directors to objective question of materiality – consideration of whether omitted of information was material

CORPORATIONS – whether director of company contravened s 674(2A) of the *Corporations Act* – whether director knowingly concerned in contravention by company of s 674(2) – consideration of state of knowledge that must be established before a person is knowingly concerned in a contravention for the purpose of s 674(2A) – whether actual knowledge required – directors found to have been knowingly involved in some contraventions

CORPORATIONS – misleading and deceptive conduct claim – was it necessary? – s 1041H of the *Corporations Act 2001* (Cth) and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) – consideration of a substantial number of representations – majority misleading or likely to mislead – consideration of continuing and future representations – representations made by an officer – whether two of the directors should be personally liable for GetSwift's misleading and deceptive conduct – circumstances in which they were the directing mind of the company – where they drafted and/or authorised the transmission of 'price sensitive' announcements to the ASX

CORPORATIONS – directors' duties – whether directors of company contravened s 180(1) of the *Corporations Act* by failing to exercise care and diligence in causing or permitting company to contravene the relevant statutory norms – consideration of the interaction between different contraventions – objective inquiry – directors found to have breached s 180(1) of the *Corporations Act*

EVIDENCE – drawing of inferences in absence of direct evidence – where defendant directors did not give evidence – consideration of the relevant principles – application of rule in *Jones v Dunkel* in civil penalty proceedings

Legislation:

Australian Securities and Investments Commission Act 2001 (Cth) ss 12BA, 12BAA, 12BAB, 12BB, 12DA, 12DB, 19

Competition and Consumer Law Act 2010 (Cth) Sch 2 s 4

Corporations Act 2001 (Cth) ss 9, 79, 180(1), 206C(1), 206E(1), 674(2), 674(2A), 675, 676, 677, 708A(5)(e), 761A, 764A(1)(a), 1001A, 1002B(2)(a), 1041H, 1042C(1), 1317G(1A), 1317R

Evidence Act 1995 (Cth) ss 55, 56, 128, 136, 140

Federal Court of Australia Act 1976 (Cth) Pt VB

Trade Practices Act 1974 (Cth) s 51A

Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) Sch 3, item 6

Cases cited:

Adams v Director of the Fair Work Building Industry Inspectorate [2017] FCAFC 228; (2017) 258 FCR 257

Adler v Australian Securities and Investments Commission (ASIC) [2003] NSWCA 131; (2003) 179 FLR 1

Agricultural Land Management Ltd v Jackson (No 2) [2014] WASC 102; (2014) 48 WAR 1

Ambergate Ltd v CMA Corp Ltd (Administrators Appointed) [2016] FCA 94; (2016) 110 ACSR 642

Ashby v Slipper [2014] FCAFC 15; (2014) 219 FCR 322

Australian Broadcasting Corporation v Chau Chak Wing [2019] FCAFC 125; (2019) 271 FCR 632

Australian Competition and Consumer Commission (ACCC) v Giraffe World Australia Pty Ltd (No 2) [1999] FCA 1161; (1999) 95 FCR 302

Australian Competition and Consumer Commission (ACCC) v Safety Compliance Pty Ltd (in liq) [2015] FCA 211

Australian Competition and Consumer Commission (ACCC) v Telstra Corporation Ltd [2007] FCA 1904; (2007) 244 ALR 470

Australian Competition and Consumer Commission v Francis [2004] FCA 487; (2004) 142 FCR 1

Australian Prudential Regulation Authority v Kelaher [2019] FCA 1521; (2019) 138 ACSR 459

Australian Securities and Investments Commission (ASIC) v ActiveSuper Pty Ltd (in liq) [2015] FCA 342; (2015) 235 FCR 181

Australian Securities and Investments Commission (ASIC) v AMP Financial Planning Pty Ltd (No 2) [2020] FCA 69; (2020) 377 ALR 55

Australian Securities and Investments Commission (ASIC) v Big Star Energy Ltd (No 3) [2020] FCA 1442; (2020) 389 ALR 17

Australian Securities and Investments Commission (ASIC) v Citigroup Global Markets Australia Pty Ltd (No 4) [2007] FCA 963; (2007) 160 FCR 35

Australian Securities and Investments Commission (ASIC) v Cycclone Magnetic Engines Inc [2009] QSC 58; (2009) 224 FLR 50

Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd (No 5) [2009] FCA 1586; (2009) 264 ALR 201

Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd [2011] FCAFC 19; (2011) 190 FCR 364

Australian Securities and Investments Commission (ASIC) v Healey [2011] FCA 717; (2011) 196 FCR 291

Australian Securities and Investments Commission (ASIC) v Hellicar [2012] HCA 17; (2012) 247 CLR 345

Australian Securities and Investments Commission (ASIC) v King [2020] HCA 4; (2020) 376 ALR 1

Australian Securities and Investments Commission (ASIC) v Lindberg [2012] VSC 332; (2012) 91 ACSR 640

Australian Securities and Investments Commission (ASIC) v Macdonald (No 12) [2009] NSWSC 714; (2009) 259 ALR 116

Australian Securities and Investments Commission (ASIC) v Maxwell [2006] NSWSC 1052; (2006) 59 ACSR 373

Australian Securities and Investments Commission (ASIC) v Narain [2008] FCAFC 120; (2008) 169 FCR 211

Australian Securities and Investments Commission (ASIC) v Rich [2009] NSWSC 1229; (2009) 236 FLR 1

Australian Securities and Investments Commission (ASIC) v Sino Australia Oil and Gas Limited (in liq) [2016] FCA 934; (2016) 115 ACSR 437

*Australian Securities and Investments Commission (ASIC) v Sydney Investment House Equities Pty Lt*d [2008] NSWSC 1224; (2008) 69 ACSR 1

Australian Securities and Investments Commission (ASIC) v Vocation (in liq) [2019] FCA 807; (2019) 371 ALR 155

Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd (1990) 169 CLR 279

Blatch v Archer (1774) 1 Cowp 63

Botany Bay City Council v Jazabas Pty Ltd [2001] NSWCA 94; [2001] ATPR 46-210

Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

Briginshaw v Briginshaw (1938) 60 CLR 336

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; (2004) 218 CLR 592

Campbell v Backoffice Investments Pty Ltd [2009] HCA 25; (2009) 238 CLR 304

Campomar Sociedad, Limitada v Nike International Ltd [2000] HCA 12; (2000) 202 CLR 45

Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52; (2020) 275 FCR 533

CellOS Software Ltd v Huber [2018] FCA 2069; (2018) 132 ACSR 468

Chong & Neale v CC Containers Pty Ltd [2015] VSCA 137; (2015) 49 VR 402

Commonwealth Bank of Australia v Kojic [2016] FCAFC 186; (2016) 249 FCR 421

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission [2007] FCAFC 132; (2007) 162 FCR 466

CSG Limited v Fuji Xerox Australia Pty Ltd [2011] NSWCA 335

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31

Dilosa v Latec Finance Pty Ltd (No 2) [1966] 1 NSWR 259; (1966) 84 WN (Pt 1) (NSW) 557

Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199

Ethicon Sàrl v Gill [2021] FCAFC 29

EYZ Accounting 123 Pty Ltd v Fair Work Ombudsman [2018] FCAFC 134; (2018) 360 ALR 261

Fair Work Ombudsman v Devine Marine Group Pty Ltd [2014] FCA 1365

Forrest v Australian Securities and Investments Commission [2012] HCA 39; (2012) 247 CLR 486

Fubilan Catering Services Ltd v Compass Group (Australia) Pty Ltd [2007] FCA 1205

GetSwift Limited, in the matter of GetSwift Limited (No 2) [2020] FCA 1733

Girlock (Sales) Pty Ltd v Hurrell (1982) 149 CLR 155

Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82

Google Inc v Australian Competition and Consumer Commission (ACCC) [2013] HCA 1; (2013) 249 CLR 435

Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq) (1916) 22 CLR 490

Grant-Taylor v Babcock & Brown Limited (in liq) [2015] FCA 149; (2015) 322 ALR 723

Grant-Taylor v Babcock & Brown Ltd (in liq) [2016] FCAFC 60; (2016) 245 FCR 402

HL Bolton (Engineering) Company Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159

Ho v Powell [2001] NSWCA 168; (2001) 51 NSWLR 572

Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216

Houghton v Arms [2006] HCA 59; (2006) 225 CLR 553

Howell v Macquarie University [2008] NSWCA 26

Insurance Commissioner v Joyce (1948) 77 CLR 39

James Hardie Industries NV v Australian Securities and Investments Commission (ASIC) [2010] NSWCA 332; (2010) 274 ALR 85

Jubilee Mines NL v Riley [2009] WASCA 62; (2009) 253 ALR 673

King v Australian Securities and Investments Commission (ASIC) [2018] QCA 352; (2018) 134 ACSR 105

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; (2011) 243 CLR 361

Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd [1915] AC 705

Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd [2021] FCAFC 126

Manly Council v Byrne [2004] NSWCA 123

Marriner v Australian Super Developments Pty Ltd [2016] VSCA 141

Masters v Lombe (Liquidator); In the Matter of Babcock & Brown Limited (in liq) [2019] FCA 1720

McGrath v Australian Natural Care [2008] FCAFC 2; (2008) 165 FCR 230

Medical Benefits Fund of Australia Ltd v Cassidy [2003] FCAFC 289; (2003) 135 FCR 1

Miletich v Murchie [2012] FCA 1013; (2012) 297 ALR 566

Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd [2010] HCA 31; (2010) 241 CLR 357

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19 [2021] FCAFC 133

Momcilovic v R [2011] HCA 34; (2011) 245 CLR 1

Morley v Australian Securities and Investments Commission (ASIC) [2010] NSWCA 331; (2010) 274 ALR 205

National Australia Bank Limited v Pathway Investments Pty Ltd [2012] VSCA 168; (2012) 265 FLR 247

National Exchange Pty Ltd v Australian Securities and Investments Commission (ASIC) [2004] FCAFC 90; (2004) 49 ACSR 369

North East Equity Pty Ltd v Proud Nominees Pty Ltd [2010] FCAFC 60; (2010) 269 ALR 262

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union [2019] FCA 451; (2019) 286 IR 52

Precision Plastics Pty Limited v Demir (1975) 132 CLR

	ASX Listing Rules 3.1, 7.1, 19.3(a) ASX Guidance Note 8 Coffey J, *Enforcement of continuous disclosure in the Australian stock market* (2007) 20 AJCL 301 Department of Treasury, *CLERP Paper No. 9: Proposals for Reform – Corporate Disclosure* (Department of Treasury, Canberra, 2002) [8.2] Golding G and Kalfus N, *The continuous Evolution of Australia's Continuous Disclosure Laws* (2004) 22 C&SLJ 385 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders* (Commonwealth of Australia, Canberra, 1991) Lord Woolf MR, *Access to Justice Report, Final Report* (HMSO), 1996 *Oxford English Dictionary Online* (Oxford University Press, October 2021)
Division:	General Division
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Sub-area:	Regulator and Consumer Protection
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Date of last submissions:	12 October 2020
Date of hearing:	15 – 18, 22 – 25 and 29 – 30 June 2020; 1 – 2, 7, 9, 13 and 15 July 2020; 14 August 2020; 30 September 2020 ; 12 October 2020
Counsel for the Plaintiff:	Mr J Halley SC with Mr Y Shariff SC, Ms N Moncrief and Ms G Westgarth
Solicitor for the Plaintiff:	Johnson Winter & Slattery
Counsel for the First Defendant:	Mr M Darke SC with Mr P Flynn SC, Mr A Shearer, Ms A Munro and Mr R Jedrzejczyk
Counsel for the Second Defendant:	Mr S Finch SC with Mr S Lawrence
Counsel for the Third Defendant:	Dr R Higgins SC with Mr N Bender

Solicitor for the First, Second and Third Defendants:	Quinn Emanuel Urquhart & Sullivan
Counsel for the Fourth Defendant:	Mr J Potts SC with Ms B Ng
Solicitor for the Fourth Defendant:	Baker McKenzie

ORDERS

VID 146 of 2019

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**GETSWIFT LIMITED (ACN 604 611 556)** First Defendant
	BANE HUNTER Second Defendant
	JOEL RICHARD STUART MACDONALD Third Defendant
	BRETT EAGLE Fourth Defendant

ORDER MADE BY: **LEE J**

DATE OF ORDER: **10 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. The parties file by 5pm on 17 November 2021 an agreed minute or competing minutes of order to reflect these reasons.
2. The proceeding be adjourned for a case management hearing at 9:30am on 19 November 2021.

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

REASONS FOR JUDGMENT

CONTENTS:

K CONCLUSION AND ORDERS [2615]

LEE J:

A INTRODUCTION

1 This is a long judgment. I am tempted to say too long, but as will become evident to anyone who has the misfortune of being required to read it, the case advanced by the Australian Securities Investment Commissions (**ASIC**) was vast in scope, involving the need to wade doggedly through a prodigious documentary case and make innumerable findings along the way. After finally emerging from the Daedalian maze, one suspects that without detracting from the ultimate regulatory outcome, ASIC's case could have been refined significantly. But alas, this litigious battle was fought on a broad front.

2 In an attempt to make the judgment less unreadable, I have divided it into what can be seen from the index to be manageable chunks, broadly mirroring the hydra-headed case mounted. Additionally, at [1064] and [2105] below, I have included ready-reckoners for the continuous disclosure and misleading and deceptive conduct claims, providing details of my conclusions, and providing a "roadmap" to where important findings are made. Referencing matters in the body of the text would, in a judgment this size, be overwhelming, and so I have adopted the expedient of using footnotes (although, because of a desire to avoid repetition, a footnote or cross reference is often illustrative, rather than the exclusive source of the relevant reference).

A.1 Overview of case

3 The case concerns GetSwift Limited (**GetSwift**), a former market darling listed on the Australian Securities Exchange (**ASX**). As it happens, it is no longer listed on the ASX. In an unusual development during the pendency of regulatory proceedings, at around the same time the evidence concluded in the liability phase of this case before me, GetSwift entered into an implementation deed in relation to a proposed scheme of arrangement, the intended purpose of which was to re-domicile GetSwift to Canada (being a scheme ultimately approved, but over the opposition of ASIC): see *GetSwift Limited, in the matter of GetSwift Limited (No 2)* [2020] FCA 1733 (at [12], [52], [81], [138], and orders 17 December 2020 per Farrell J).

4 In any event, returning to the period relevant to this liability hearing, this case comes against the background of GetSwift experiencing a dramatic ascension in the value of its shares from an issue price of 20 cents upon listing in December 2016 to over $4, prior to a trading halt announcement in December 2017, in advance of its second placement, by which GetSwift successfully raised $75 million from investors. One year later, on 7 December 2018 the share

price dropped to $0.52 – a percentage decrease of almost 90% from its all-time high of $4.30, as recorded on 4 December 2017.[1]

5 It is notable that GetSwift, which might aptly be described as an early stage "tech" company, was able to generate such significant momentum and interest in its share price at a time when the company had "incurred historic operating losses to date".[2] This is especially so in circumstances where potential investors would have likely faced some difficulties in assessing the true value of GetSwift shares due to the absence of any successful track record and its "limited operating history".[3]

6 Put broadly, the case concerns whether GetSwift failed to disclose material information in a series of announcements to the ASX, including by not revealing the status of its actual engagements with regard to its various customers. It also examines whether GetSwift engaged in misleading or deceptive statements regarding the nature and scale of the financial benefit that GetSwift stood to obtain from each agreement.

7 This proceeding also relevantly focusses on the conduct of three directors of GetSwift, namely:

(1) Mr Bane Hunter, the second defendant, who was the executive chairman and chief executive officer of GetSwift;

(2) Mr Joel Macdonald, the third defendant, who was the managing director of GetSwift; and

(3) Mr Brett Eagle, the fourth defendant, a solicitor, who was a non-executive director and GetSwift's general counsel.

8 Despite the skilful submissions made on behalf of the defendants, a close review of the contemporaneous record reveals with clarity to any sentient person what went on at GetSwift. At the risk of over-generalisation, what follows reveals what might be described as a public-relations-driven approach to corporate disclosure on behalf of those wielding power within the company, motivated by a desire to make regular announcements of successful entry into agreements with a number of national and multinational enterprise clients.

[1] First Molony Report (GSW.0002.0004.0001_R) at [7]; GSW.0003.0005.0325 at 5.
[2] Prospectus (GSW.1001.0001.0478) at 0489.
[3] Prospectus (GSW.1001.0001.0478) at 0522.

9 There is a plethora of documentary evidence in the form of emails exchanged between some of the directors revealing efforts directed at the strategic timing of ASX announcements, making sure that announcements were marked as "price sensitive", orchestrating simultaneous media coverage, and evincing an appreciation that the failure to release announcements of new client agreements would or could have a negative impact on investor expectations.

10 As will appear in more detail below, numerous emails from Mr Hunter are most telling as to GetSwift's approach to communicating with the market, and the level of control he sought to assert. Among many examples is an email to a fellow director, Ms Jamila Gordon (who is not a defendant) sent on 24 February 2017 in the wake of the release of one ASX announcement, in which he stated: "Bit by bit until we get to a $7.50 share price :)".[4] He then followed this email up with the following missive to his fellow directors:

> I wanted to take a quick moment and just put some things into context – today's strategic account contract capture [*sic*] information and the timing of the release added approx. $3.8m to the companies [*sic*] market cap. That's making all our shareholders much happier.
>
> To date since IPO listing price I am pleased to inform you that the company [*sic*] share price is up 140% - the strongest performer on the ASX. **That means that I have driven the market value of the company up by more than $36m in 3 months**. We are now worth more than $63M and heading towards $200m in very short order. **These results are not accidental.**
>
> Therefore please keep that in mind when I insist on certain structural and orderly processes that there are much more complex requirements that are at play.
>
> It is also important to stress that it is imperative that non commercial [*sic*] structures and resources we have in place are fully supporting the revenue and market cap based portions of the company. These have absolute priority over anything else. Without those as our primary focus not much progress will be made.
>
> We have a tremendous year ahead of us and the timely planning and delivery of key commercial accounts is paramount. … Failure to do so will prompt an [*sic*] revised management structure.
>
> In May we will be under the spotlight again with another significant investment round planned leading up to a much larger and final round in Oct or thereabouts. So as you can imagine **I will not wait until May to course correct this organization staffing [if] we are not tracing as planned or better than planned**.
>
> **Folks I am serious about this , please do not that there was no fair notice given of the expectations needed. Please do not confuse my friendly attitude for tolerance or forgiveness when it comes to achieving the deliverables set in front of us. There**

[4] GSWASIC00025659.

> **is too much at stake to allow for any lack of control. If you are unable or unwilling to operate as such please let me know.**
>
> This company if we achieve or our **objectives in 2 years [*sic*] be valued well above the $800M + market cap**, and **no excuse will stand in our way to reach that goal.** The **rewards will be fantastic and amazing especially when you consider the timeline**, so let's stay focussed now more than ever.[5]

11 Mr Hunter had a habit of writing in evocative terms. This is reflected in many communications including an email sent by Mr Hunter on 6 October 2017 to Mr Macdonald making reference to an apparent long-term aim discussed between them: "no rest till we are north of 1$b and I know you are taken care of for the future - I made you a promise - do or die on my part".[6]

12 Not only did Mr Hunter demonstrate a high level of concern over the content of the ASX announcements, it is evident that he sought to exercise close control over the release of such announcements. This is vividly illustrated by Mr Hunter's emails in late August 2017, including one sent to Ms Susan Cox (of GetSwift) on 25 August 2017 in which he stated: "You know that any market release have [*sic*] to be vetted by us" ("us" being a reference to both himself and Mr Macdonald).[7] In the same email chain, Mr Hunter also said the following to Ms Cox:

> You have made an incredible misjudgment [*sic*] and overstepped your bounds. I am flabbergasted that you thought it was ok to release anything on the ASX without Joel and my approval…Let me make this crystal clear - we have NEVER released anything EVER without Joel or mine [*sic*] approval or review first.[8]

13 The intense focus that Mr Hunter and Mr Macdonald placed on the ASX announcements forms an important aspect of this case, to which I will return in detail below (at Part H.4.2). However, at a broad level, these illustrative emails are reflective of another aspect of the evidence; that is, the nature of the relationship between Mr Hunter and his colleagues. As will be seen from the numerous communications (liberally sprinkled with capitalised words) reproduced below, Mr Hunter displayed a management style that owed little to the influence of the late Dale Carnegie. He was demanding, forceful and regularly brusque to the point of rudeness.

[5] GSW.0015.0001.0808 (emphasis added).
[6] GSWASIC00030902.
[7] GSWASIC00012280.
[8] GSWASIC00012280.

14 The evidence does not disclose whether Ms Gordon was conscious of Mr Hunter displaying his self-described "friendly attitude" towards her at any time: c.f. [10] above. What is evident is that their relationship does not appear to have been a congenial one after March 2017, when Ms Gordon started to raise concerns in relation to the processes employed by Messrs Hunter and Macdonald as to announcements GetSwift made to the ASX.[9] On one occasion, Mr Hunter told Ms Gordon that he had more experience in corporate governance than her, and suggested that the questions she was asking were naïve.[10] But her concerns were not those of an ingénue and it is worth noting that, as at 9 December 2016, Ms Gordon was the only director on the board with any corporate governance training.[11]

15 On another occasion, at a September 2017 board meeting in which she was participating remotely, Ms Gordon was told by Mr Hunter she was on the "hot spot" in relation to her questions as to the materiality of an ASX announcement.[12] Mr Eagle then spoke uninterrupted for about 12 minutes, apparently from a document, upbraiding her for "governance issues", including causing delays in making announcements. Ms Gordon (who was born in Somalia and escaped that country before civil war broke out in 1991 and studied English at a TAFE college before university)[13] was trying to write down what was being said, could not keep up, and asked for a copy of the document that Mr Eagle was reading from so she could counter the criticism properly. Mr Hunter responded by saying words to the effect, "Let me put it to you in English you can understand" and then repeated the details of her perceived deficiencies at similar length. She eventually responded:

> [A]s a director I'm accountable having these announcements released without my total understanding and having a board meeting where… my objections, if I have objections, are minuted, therefore I have huge exposure and responsibility and that's why I'm raising these issues.[14]

16 To this Mr Hunter responded: "that's why you have director's insurance."[15]

[9] Gordon Affidavit (GSW.0009.0021.0001_R) at [35].
[10] Gordon Affidavit (GSW.0009.0021.0001_R) at [41].
[11] GSWASIC00065793.
[12] Gordon Affidavit (GSW.0009.0021.0001_R) at [47].
[13] GSW.0003.0003.0404 at 0421.
[14] T247.41–44 (Day 4).
[15] T247.1–248.2 (Day 4).

17 By 24 October 2017, Mr Hunter was writing to his fellow director as follows:

> [D]o NOT reach out to our customers where you do not own the relationship without prior approval -you were explicitly told you are not to get involved with commercial discussions . You only own the CBA relationship that's it. You are NOT authorized to negotiate on behalf of the company with any other entity. This is an instant termination for cause if you do.[16]

18 Ms Gordon was removed from GetSwift shortly thereafter.

19 I will return below to the importance and clarity of Ms Gordon's evidence, the way the board of GetSwift operated, the relevance of the relationship between the directors, and their respective roles and power within the entity.

A.2 The GetSwift platform and business model

20 Before progressing further, it is useful to provide a brief summary of the GetSwift platform and its business model.

21 GetSwift's business and fee structure model was described in a prospectus that GetSwift lodged with ASIC in late 2016 with regard to an initial public offering (**Prospectus**).[17] GetSwift was in the business of providing clients with a "software as a service" (**SaaS**) platform (**GetSwift Platform**) for the management of "last-mile delivery" services globally. "Last mile delivery", as might be expected, describes the carriage of goods from a transportation hub to its final destination. The GetSwift Platform could be used to effect delivery services either through a client's own driver network or with a contracted service.

22 GetSwift described itself as offering a "white label" solution, enabling technology to companies for a low, "pay as you use" transaction-based fee.[18] Its revenue was generated on a "per delivery basis", which involved charging a $0.29 transaction fee per delivery.[19] Discounts were applied to larger clients through a tiered fee structure based on the client's monthly transactional volume and the length of contract commitment. There were no fixed maintenance

[16] Gordon Affidavit (GSW.0009.0021.0001_R) at [177].
[17] Prospectus (GSW.1001.0001.0478).
[18] Prospectus (GSW.1001.0001.0478) at 0607.
[19] Prospectus (GSW.1001.0001.0478) at 0607.

or upfront fees. A client could incur additional fixed subscription fees for fleet management and smart routing and SMS charges were "on-charged" as status updates.[20]

23 The Prospectus highlighted that GetSwift intended to "expand" by capturing market share and scaling its existing footprint.[21] Its key strength was its "high growth" and the number of so-called "client industry verticals" it serviced.[22] However, there were also risks, including that "[e]ven once clients are successfully attracted to the GetSwift platform and related services, clients may terminate their relationship with the Company *at any time*".[23] As GetSwift explained, this meant that if clients terminated their relationship, this could adversely impact GetSwift's business, financial position, results of operations, cash flows and prospects.[24] Further, as an "early stage technology company", the Prospectus stated that GetSwift had accumulated a loss of approximately $946,402 as at 30 June 2016.[25]

24 GetSwift focussed on two main client segments: larger organisations with multi-site requirements and the capability for 10,000 or more deliveries per month (**Enterprise Clients**); and small and medium businesses (**Self-serve Clients**).[26]

25 In addition to making the general statement that clients may terminate their relationship with GetSwift at any time (see [23]), GetSwift made three important statements in the Prospectus as to its Enterprise Clients: *first*, GetSwift typically granted a 90-day proof of concept trial (**POC**) before the client moved to a standard contract; *secondly*, contracts for Enterprise Clients were initially for two years in length; and *thirdly*, those Enterprise Clients who had entered into a POC had a 100% sign up rate to contracts as at the date of the Prospectus.[27]

26 By making each of these statements in its Prospectus, ASIC alleges that GetSwift represented to investors that:

[20] Prospectus (GSW.1001.0001.0478) at 0607.
[21] Prospectus (GSW.1001.0001.0478) at 0490.
[22] Prospectus (GSW.1001.0001.0478) at 0491, 0506, and 0523.
[23] Prospectus (GSW.1001.0001.0478) at 0523 (emphasis added).
[24] Prospectus (GSW.1001.0001.0478) at 0522.
[25] Prospectus (GSW.1001.0001.0478) at 0489.
[26] Prospectus (GSW.1001.0001.0478) at 0607–0608.
[27] Prospectus (GSW.1001.0001.0478) at 0490, 0507.

(1) a POC (or trial phase) would be completed before GetSwift entered into an agreement with an Enterprise Client for the supply of GetSwift's services for a reward;

(2) any agreement entered into by GetSwift with Enterprise Clients for the supply of GetSwift's services were not conditional upon completion of concept or trial; and

(3) Enterprise Clients would only enter into an agreement after the proof of concept or trial phase had been successfully completed.

(collectively, the **First Agreement After Trial Representation**)

27 In addition to the statements made in the Prospectus, on 9 May 2017, GetSwift created a PowerPoint presentation for investors, which was submitted to the ASX.[28] This presentation stated that Enterprise Clients were multi-regional businesses, typically with over 10,000 transactions per month. Further, it specified that Enterprise Clients have a "POC 60-90 day trial" and that these clients received contracted services for typically two to three years (**Second Agreement After Trial Representation**).[29]

28 I will return to whether each of these representations was conveyed below (at Part I.3), where findings are made as to whether the conduct of GetSwift, Mr Hunter and Mr Macdonald was misleading or deceptive, or likely to mislead or deceive.

A.3 Statements regarding continuous disclosure

29 As noted above, the focus of much of this case concerns the alleged continuous disclosure contraventions. GetSwift's own continuous disclosure policy was referred to in the Prospectus (**Continuous Disclosure Policy**).[30] As is typical, this policy set out certain procedures and measures that were designed to ensure that GetSwift complied with the continuous disclosure requirements of the ASX Listing Rules (**Listing Rules**) and the applicable sections of the *Corporations Act 2001* (Cth) (***Corporations Act***).[31] It also provided protocols related to the review and release of ASX announcements and media releases. Further, the Prospectus relevantly and correctly stated that GetSwift would be required to disclose to the ASX any

[28] GSW.1001.0001.0562.
[29] GSW.1001.0001.0562 at 0576; Agreed Background Facts (GSW.0002.0002.0001) at [18].
[30] Prospectus (GSW.1001.0001.0478) at 0532.
[31] Continuous Disclosure Policy (GSW.0016.0000.0001).

information concerning the company that was not generally available and that a reasonable person would expect to have a material effect on the price or value of its shares.[32] I will return to the significance of the Prospectus and Continuous Disclosure Policy below.

30 By publishing the Continuous Disclosure Policy to the ASX, it is said that GetSwift's executive directors represented that they would conduct themselves consistently with the policy. In addition, during 2017, GetSwift made three important public statements concerning GetSwift's approach to continuous disclosure.

31 *First*, in its Appendix 4C and Quarterly Review submitted to and released by the ASX on 28 April 2017 (**April Appendix 4C**), GetSwift stated (**First Quantifiable Announcements Representation**):

> [T]he company is starting to begin harvesting the markets it has prepared the groundwork over the last 18 months. Transformative and game changing partnerships are expected and will be **announced only when they are secure, quantifiable and measurable**. The company will **not report on MOUs only on executed contracts**. Even though this may represent a challenge for some clients that may wish in [some] cases not [*sic*] publicize the awarded contract, fundamentally the company will stand behind this policy of **quantifiable non hype driven announcements** even if it results in negative short term perceptions.[33]

32 *Secondly*, in its Appendix 4C and Quarterly Review submitted to and released by the ASX on 31 October 2017 (**October Appendix 4C**), GetSwift stated (**Second Quantifiable Announcements Representation**):

> Please Note: The Company will **only report executed commercial agreements**. Unlike some other groups it will **not publicly report on Memorandum of Understandings (MOU) or Letters of Intent (LOI)**, which are not commercially binding and do not have a valid assurance of future commercial outcomes.[34]

33 *Thirdly*, in its announcement submitted to and released by the ASX on 14 November 2017 and entitled "GetSwift Executes on Key Integration Partnerships",[35] GetSwift stated (**Third Quantifiable Announcements Representation**):

> The Company is taking a measured approach in ensuring that **only quantifiable and impactful announcements are delivered to the market**. With that in mind it has

[32] Prospectus (GSW.1001.0001.0478) at 0532.
[33] April 2017 Appendix 4C (GSW.1001.0001.0459) at 0461–0462 (emphasis added).
[34] October 2017 Appendix 4C and Third NAW Announcement (GSW.1001.0001.0277) at 0279 (emphasis added).
[35] Key Partnerships Announcement (GSW.1001.0001.0286).

> chosen to announce 9 of these integrations once they all have been completed rather than individually.
>
> The company in addition expects to announce key commercial agreements shortly and is pleased that the overall strategy of becoming a global leader and not just a regional leader is being manifested.[36]

34 It is alleged that the making of the latter two representations amounted to contravening conduct. Similarly, I will return to whether these representations were conveyed and whether they amounted to contraventions below (at Part I.3).

A.4 GetSwift announcements

35 Another component of this case involves analysing the commercial background, content and implications that emanated from the announcements that GetSwift made to the ASX. These announcements, made between 24 February 2018 and 1 December 2017, stem from agreements that GetSwift entered into with respect to 13 individual Enterprise Clients.

36 As noted above, during the period leading up to the second placement, GetSwift announced to the ASX that it had entered into agreements with a number of Enterprise Clients. GetSwift made these announcements, notwithstanding that some of the agreements had allegedly not progressed beyond a "trial period", and before the potential benefits under the agreements were secure, quantifiable or measurable. In this context, a question arising is whether the release of regular price sensitive announcements to the ASX of GetSwift's entry into agreements with major Enterprise Clients had the effect of reinforcing and engendering investor expectations that the GetSwift platform was being adopted by a growing number of major Enterprise Clients. These expectations are alleged to have been fashioned by the GetSwift Prospectus, investor presentations and its quarterly Appendix 4C reports (as described above).

37 It is further alleged that, in the same period, GetSwift failed to inform the market of information that materially qualified the ASX announcements. This included, among others, the termination of a number of agreements that had been the subject of an announcement, and decisions by clients that GetSwift's services would no longer be utilised beyond the expiry of trial periods. In circumstances where GetSwift had a limited operating history and had incurred historic net losses, and where publicly available information about recent operations and performance was

[36] Key Partnerships Announcement (GSW.1001.0001.0286) at 0287.

lacking, an important issue is whether GetSwift's failure to disclose such information would have had a significant influence on whether an investor would acquire or dispose of GetSwift Shares. This must be considered in the light of all relevant circumstances, including the share placement which was to take place.

A.5 Summary of claims

38 As noted above, the claims made by ASIC are complex and multifarious, but can be placed broadly into four categories by reference to each of the defendants.

39 *First,* ASIC alleges that GetSwift engaged in 22 contraventions of s 674(2) of the *Corporations Act*. In respect of these contraventions, ASIC seeks an order under s 1317G(1A) of the *Corporations Act* that GetSwift pay a pecuniary penalty in respect of the alleged continuous disclosure contraventions. Further, ASIC alleges that GetSwift engaged in misleading or deceptive conduct in contravention of s 1041H of the *Corporations Act* and/or s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***). It also seeks declaratory relief in respect of each of the alleged contraventions.

40 *Secondly,* ASIC alleges that Mr Hunter was directly, or indirectly, knowingly concerned, within the meaning of s 79 of the *Corporations Act*, in the continuous disclosure contraventions by GetSwift of s 674(2) of the *Corporations Act*, and was knowingly involved in 19 of the 22 contraventions alleged against GetSwift. By reason of this conduct, Mr Hunter contravened s 674(2A) of the *Corporations Act*. Further, ASIC alleges that Mr Hunter contravened s 1041H of the *Corporations Act*, and further or alternatively, s 12DA of the *ASIC Act*. Finally, ASIC alleges that Mr Hunter failed to exercise his powers and discharge his duties as a director and executive chairman of GetSwift with the degree of care and diligence; thus contravening s 180(1) of the *Corporations Act*.

41 *Thirdly,* ASIC alleges that Mr Macdonald was directly, or indirectly, knowingly concerned, within the meaning of s 79 of the *Corporations Act*, in the continuous disclosure contraventions by GetSwift of s 674(2) of the *Corporations Act*, and was knowingly involved in all 22 of the contraventions alleged against GetSwift. By reason of this conduct, Mr Macdonald contravened s 674(2A) of the *Corporations Act*. Further, ASIC alleges that Mr Macdonald contravened s 1041H of the *Corporations Act*, and further or alternatively, s 12DA of the *ASIC Act*. Finally, ASIC alleges that Mr Macdonald failed to exercise his powers and discharge his duties as a director and managing director of GetSwift with the degree of care and diligence; thus contravening s 180(1) of the *Corporations Act*.

42 *Fourthly*, ASIC alleges that Mr Eagle was directly, or indirectly, knowingly concerned, within the meaning of s 79 of the *Corporations Act*, in the continuous disclosure contraventions by GetSwift of s 674(2) of the *Corporations Act*, and was knowingly involved in nine of the 22 contraventions alleged against GetSwift. By reason of this conduct, Mr Eagle contravened s 674(2A) of the *Corporations Act*. Further, ASIC alleges that Mr Eagle failed to exercise his powers and discharge his duties as a director of GetSwift with the degree of care and diligence; thus contravening s 180(1) of the *Corporations Act*.

43 In respect of each of the contraventions of ss 674(2A) and 180(1) of the *Corporations Act* by each of the directors, ASIC seeks pecuniary penalties. Further, ASIC seeks disqualification orders pursuant to s 206C(1) and/or s 206E(1) of the *Corporations Act*. Importantly, with the consent of the parties, the hearing conducted in 2020 was an initial hearing directed to issues of liability and the entitlement of ASIC to declaratory relief. Therefore, any issues of penal orders are to be determined separately and at a later date.

B PRINCIPAL CONCLUSIONS

44 Given the length of what follows, it is useful to set out a summary of the principal conclusions that I have reached in relation to each claim.

45 *First*, GetSwift engaged in:

(1) 22 contraventions of s 674(2) of the *Corporations Act*; and

(2) 40 contraventions of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act.*

46 *Secondly*, Mr Hunter:

(1) was knowingly involved in 16 of the 22 contraventions of GetSwift and thereby contravened s 674(2A) of the *Corporations Act*

(2) engaged in 29 contraventions of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*; and

(3) failed to exercise his powers and discharge his duties as a director with the degree of care and diligence required and thereby contravened s 180(1) of the *Corporations Act*.

47 *Thirdly*, Mr Macdonald:

(1) was knowingly involved in 20 of GetSwift's 22 contraventions and thereby contravened s 674(2A) of the *Corporations Act*;

(2) engaged in 33 contraventions of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*; and

(3) failed to exercise his powers and discharge his duties as a director with the degree of care and diligence required and thereby contravened s 180(1) of the *Corporations Act*.

48 *Fourthly*, Mr Eagle:

(1) was knowingly involved in three of GetSwift's 22 contraventions and thereby contravened s 674(2A) of the *Corporations Act*; and

(2) failed to exercise his powers and discharge his duties as a director with the degree of care and diligence required and thereby contravened s 180(1) of the *Corporations Act*.

C THE DEFENDANTS, THE BOARD AND OTHER KEY PLAYERS

C.1 The defendants

49 GetSwift was incorporated on 6 March 2015 and from 7 December 2016, was a public company registered under the provisions of the *Corporations Act*. Relevantly, GetSwift was a listed disclosing entity and was subject to the continuous disclosure requirements of s 674 of the *Corporations Act*; and was subject to and bound by the Listing Rules.[37]

50 Mr Hunter has been a director of GetSwift since 26 October 2016, is the chief executive officer of GetSwift, and was the executive chairman of GetSwift between 26 October 2016 and 25 April 2018.[38] Mr Macdonald has been a director of GetSwift since 26 October 2016, is the so-called "President" of GetSwift, and was the managing director of GetSwift between 26 October 2016 and 25 April 2018.[39]

51 Mr Eagle was a non-executive director of GetSwift between 26 October 2016 and 29 November 2018, between August 2017 and 21 August 2018, held the position of "General Counsel & Corporate Affairs" at GetSwift pursuant to a retainer between Eagle Corporate Advisers Pty Ltd (**Eagle Corporate Advisers**) and GetSwift, and between 26 October 2016

[37] Agreed Background Facts (GSW.0002.0002.0001) at [6].
[38] Agreed Background Facts (GSW.0002.0002.0001) at [7].
[39] Agreed Background Facts (GSW.0002.0002.0001) at [8].

and 29 November 2018, was a solicitor admitted in New South Wales and the principal and sole director of Eagle Corporate Advisers.[40]

52 Beyond the facts as agreed between ASIC and GetSwift, there is additional evidence, as raised by Mr Hunter (and implied by Mr Macdonald) in their submissions, that Mr Eagle carried out the role of general counsel of GetSwift beginning no later than early February 2017 (rather than August 2017).[41] Three aspects of the evidence are drawn upon to support this conclusion: *first*, in an email dated 8 February 2017, it was requested that a GetSwift business card be made for Mr Eagle with the title "General Counsel & Corporate Affairs";[42] *secondly*, in an email dated 17 March 2017, Mr Eagle stated "I am a director of GetSwift Ltd and also general counsel";[43] and *thirdly*, in an email dated 24 April 2017, Mr Eagle stated "I am general counsel at GetSwift".[44] In the absence of any explanation by Mr Eagle himself, the evidence supports a conclusion that Mr Eagle was the General Counsel of GetSwift (or at least the *de facto* General Counsel of the company) from at least 8 February 2017.[45] Therefore, between February and August 2017, it would appear that things at GetSwift were simply being done in a relatively informal way concerning Mr Eagle's position. Although, as will become evident below, this finding is immaterial to the disposition of any aspect of the case.

C.2 Operations of the board of GetSwift

53 During 2017, Messrs Hunter and Macdonald were based in New York,[46] Mr Eagle was based in Sydney,[47] and Ms Gordon worked in Melbourne from December 2016 to June 2017, and thereafter from Sydney until the conclusion of her engagement in November 2017.[48]

54 The evidence reveals that board meetings were conducted intermittently when Mr Hunter determined they should be called by the circulation of an invitation from him.[49] The formality

[40] Agreed Background Facts (GSW.0002.0002.0001) at [9].
[41] See DEF.0002.0003.0423 at [16]–[17].
[42] SWI00096266 attaching SWI00096267.
[43] SWI00118884.
[44] SWI00078505.
[45] See also T1191.44–1194.18 (Day 18).
[46] Gordon Affidavit (GSW.0009.0021.0001_R) at [16].
[47] Gordon Affidavit (GSW.0009.0021.0001_R) at [16].
[48] Gordon Affidavit (GSW.0009.0021.0001_R) at [13].
[49] Gordon Affidavit (GSW.0009.0021.0001_R) at [31].

of the invitation and documentation differed depending on what was required.[50] The directors received reports for quarterly, half yearly and annual reporting, but nothing else.[51] There were otherwise no "board packs" or equivalent sets of documents circulated before board meetings.[52] The board meetings were usually conducted via video conference.[53]

55 Mr Scott Mison, the company secretary for a large part of 2017, held an essentially administrative role.[54] He was not responsible for preparing the agenda for board meetings and he otherwise prepared certain formal documents relating to the issue of shares.[55] Shortly after he was appointed as company secretary and sometime in early 2017, Mr Hunter (somewhat unusually for a public company) instructed Mr Mison not to attend board meetings.[56] To Mr Mison's recollection, he only attended a board meeting in December 2016 and in January 2017 by telephone.[57]

56 Apart from board meetings, most communication between directors was by email, as is revealed by the deluge of emails admitted into evidence.[58]

C.3 Other personnel at GetSwift

57 GetSwift had few employees or staff. As at September 2016, the non-director employees included Mr Keith Urquhart (software developer and client services) based in Melbourne, Mr Joash Chong (software developer) based in Melbourne, Ms Stephanie Noot (accounts, payroll and finance) based in Sydney, Ms Susan Cox (administration and human resources) based in Perth, and the abovementioned Mr Mison (who was later replaced in August 2017) and was based in Perth.[59] Other key employees of GetSwift included Mr Jonathan Ozovek, Mr Daniel Lawrence, Mr Brian Aiken and Mr Kurt Clothier.

[50] Gordon Affidavit (GSW.0009.0021.0001_R) at [31].
[51] Gordon Affidavit (GSW.0009.0021.0001_R) at [31].
[52] Gordon Affidavit (GSW.0009.0021.0001_R) at [31].
[53] Gordon Affidavit (GSW.0009.0021.0001_R) at [31].
[54] Affidavit of Scott Adrian Mison affirmed 4 October 2019 (**Mison Affidavit**) (GSW.0009.0036.0001_R) at [21].
[55] Mison Affidavit (GSW.0009.0036.0001_R) at [21].
[56] Mison Affidavit (GSW.0009.0036.0001_R) at [23].
[57] Mison Affidavit (GSW.0009.0036.0001_R) at [23]–[25].
[58] Gordon Affidavit (GSW.0009.0036.0001_R) at [32].
[59] Gordon Affidavit (GSW.0009.0021.0001_R) at [16]; Mison Affidavit (GSW.0009.0036.0001_R) at [60].

58 GetSwift was assisted by Mr Harrison Polites and Ms Elise Hughan (from Media and Capital Partners) (**M+C Partners**). M+C Partners was responsible for managing GetSwift's media, including the generation of media, journalist enquiries and the preparation of media releases for the press.[60] GetSwift was also assisted by Mr Zane Banson (from The CFO Solution). The CFO Solution was managed by Mr Phillip Hains.[61] It provided bookkeeping, accounting, preparation of board papers and company secretarial work.[62] In July 2017, The CFO Solution was approached by GetSwift to provide it with accounting services.[63] Following the resignation of Mr Mison, Mr Hains and The CFO Solution commenced performing secretarial work for GetSwift in late August 2017.[64] While Mr Hains was the company secretary, Mr Banson had primary responsibility for assisting GetSwift (if that is the right word) with the lodgement of ASX announcements.[65]

D THE EVIDENCE GENERALLY

59 As indicated above, this case was primarily run on the basis of documentary evidence, supplemented by affidavit and expert evidence.

60 It is useful to make a few observations about the evidence generally.

D.1 ASIC's evidence

61 As I noted in *Webb v GetSwift Limited (No 6)* [2020] FCA 1292 (at [9]):

> ASIC relied upon [39] witnesses from customers of GetSwift: four witnesses who were former associates of GetSwift; 10 witnesses from ASIC, the Australian Securities Exchange and Chi-X Australia (a securities and derivatives exchange); and four witnesses from organisations who were large investors in GetSwift. It also relied on opinion evidence from Mr Molony as a "professional investor". Senior Counsel for GetSwift accepted on this application that none of the witnesses called by ASIC were challenged on their credit.

[60] Affidavit of Harrison James Polites affirmed 26 September 2019 (**Polites Affidavit**) (GSW.0009.0019.0001_R) at [16].
[61] Affidavit of Zane Kyle Banson affirmed 4 October 2019 (**Banson Affidavit**) (GSW.0009.0042.0001_R) at [7].
[62] Banson Affidavit (GSW.0009.0042.0001_R) at [7].
[63] Banson Affidavit (GSW.0009.0042.0001_R) at [11].
[64] Banson Affidavit (GSW.0009.0042.0001_R) at [15], and [17].
[65] Banson Affidavit (GSW.0009.0042.0001_R) at [18].

62 Out of this total of 39 witnesses, ASIC called four witnesses who were GetSwift employees and associate witnesses: Jamila Gordon (GetSwift); Scott Mison (GetSwift); Zane Banson (CFO Solution); and Harrison Polites (MC Partners).

63 The 19 customer witnesses of GetSwift were: Martin Halphen (Fruit Box); Veronika Mikac (Fruit Box); Ciara Dooley (Fruit Box); Allan Madoc (CBA); Bruce Begbie (CBA); Edward Chambers (CBA); David Budzevski (CBA)c; Natalie Kitchen (CBA); Patrick Branley (Pizza Pan); Alex White (APT); Paul Calleja (CITO); Mark Jenkinson (CITO); Devesh Sinha (Yum); Simon Nguyen (Fantastic Furniture); Abdulah Jaafar (Fantastic Furniture); Mariza Hardin (Amazon); Amelia Smith (Betta); Adrian Mitchell (Betta); and Roger McCollum (NAW).

64 The four investor witnesses were: Anthony Vogel; Timothy Hall; Maroun Younes; and Katherine Howitt.

65 The ten witnesses from ASIC, the ASX and Chi-X Australia (a securities and derivatives exchange) were: Kristina Czajkowskyj (ASX); Andrew Black (ASX); Andrew Kabega (ASX); Stuart Dent (ASIC): Benjamin Jackson (ASX); Jamie Halstead (ASX); Stephanie Yu-Ching So (ASX); Michael Somes (Chi-X); Martin Wood (ASIC); and Michael Hassett (ASIC). ASIC also relied on expert opinion evidence from Andrew Molony as a "professional investor".

66 Out of these witnesses, 25 were cross-examined: Scott Mison; Jamila Gordon; Martin Halphen; Veronika Mikac; Ciara Dooley; Allan Madoc; Edward Chambers; David Budzevski; Natalie Kitchen; Harrison Polites; Patrick Branley; Alex White: Paul Calleja; Mark Jenkinson; Simon Nguyen; Abdulah Jaafar; Amelia Smith; Devesh Sinha; Mariza Hardin; Maroun Younes; Katherine Howitt; Timothy Hall; Anthony Vogul; Roger McCollum; and Andrew Molony.

67 Despite the cross-examination which took place, the evidence of the witnesses was not the subject of any real challenges as to credit: see *Webb v GetSwift Limited (No 6)* (at [9]). Accordingly, although some findings made below are necessarily based, at least to some extent, on my assessment of the credit of a witness, I have found it unnecessary to make general credit findings for the purposes of determining the relevant facts. Notwithstanding this, I do wish to make one general credit finding in relation to the evidence of one director of GetSwift: Ms Gordon was a highly impressive witness, was both careful and sober in her presentation, made appropriate concessions, and was clearly a witness of truth. I accept her evidence in its entirety.

68 Ms Gordon became a director of GetSwift on 20 March 2016. She was the Global Chief Information Officer (**CIO**) from 2 February 2017 until 13 June 2017. Ms Gordon undertook a

variety of roles at GetSwift. When she was first engaged by GetSwift, Ms Gordon's role included reviewing the Prospectus, understanding GetSwift's governance arrangements, "on-boarding" clients once they had been "won", as well as opening the Melbourne office. As CIO, she expanded GetSwift's product offering by making it scalable, ensured that the right developers and testers worked on the GetSwift Platform, "on-boarded" clients, and made sure specific customisations were made to the GetSwift Platform. On 13 June 2017, Ms Gordon ceased working as CIO and her responsibilities were significantly reduced. In addition to working as a director, Ms Gordon engaged in a so-called "functional IT" role and managed the relationship with the CBA. As touched on above, her employment was terminated by GetSwift at a board meeting held on 7 November 2017. She ceased to be a director of GetSwift on 15 November 2017.[66]

69 As a director of GetSwift, Ms Gordon's evidence sheds an important light on many of the internal happenings at GetSwift. In particular, she explained communications and discussions that she had with her fellow directors, particularly in respect to the timing, nature, and content of the ASX announcements. More specifically, she explained the GetSwift Platform, governance procedures and processes which were adhered to by the directors and employees of GetSwift, details from the 13 June 2017 and 7 September 2017 board meetings, the relationship between GetSwift and Fruit Box, CBA, Genuine Parts Company, and All Purpose Transport and finally, circumstances relating to her termination.[67]

D.2 The position of the Defendants

70 It is important to make a general observation about the way in which the defendants ran their case. The individual defendants did not go into the witness box, nor did they call any witnesses. Cross-examination of ASIC's witnesses was primarily conducted on behalf of GetSwift, not by counsel for the directors. Furthermore, although the defendants each had separate counsel teams, they were represented by the same solicitors (except for Mr Eagle, who was represented separately). The individual defendants maintained their privilege against exposure to a penalty.

[66] See Gordon Affidavit (GSW.0009.0021.0001_R).
[67] See Gordon Affidavit (GSW.0009.0021.0001_R).

E A DISPUTE ABOUT ASIC'S PLEADED CONTINUOUS DICLOSURE CASE

71 Before making factual findings, it is necessary at the outset to address one overarching and contested issue which arose at different stages throughout the proceeding, including during the trial. The issue concerned the way in which ASIC's continuous disclosure case was pleaded and run.

E.1 The iterations of ASIC's pleaded case

72 Even though ASIC took plenty of time prior to commencing its case, various iterations of the pleaded case have been served throughout this proceeding. This has resulted in unnecessary disputation and controversy as to whether ASIC has gone beyond its pleaded case. More particularly, the dispute concerns the substance of ASIC's pleaded case in relation to the categories of information relied upon for the purposes of the alleged continuous disclosure contraventions.

73 GetSwift argues that ASIC has pleaded a case that requires it to prove that *each individual element* of the pleaded categories of information in itself was not generally available and was material. In this way, GetSwift's contention is that ASIC has pleaded an "all or nothing" case: that is, it must prove that each individual element was both not generally available and material. If but one element or component cannot be proven, the entire relevant continuous disclosure case fails.

74 On the other hand, ASIC maintains that its case does not necessarily fail, even if an element of the pleaded categories of information are not made out. Put somewhat simplistically, ASIC argues that its pleaded case simply requires it to prove that the *information as a whole*, being the combination of the elements of the pleaded information it proved existed, was not generally available and was material.

75 In determining the substance of ASIC's pleaded case, it is important to emphasise, as I did during the course of oral submissions on this issue, that ASIC has attempted to run a consistent case from the beginning of the proceeding. This view holds, notwithstanding that the various iterations advanced by ASIC make it appear as though ASIC might have changed its pleaded case, or even resuscitated or revived a previous case. Regrettably, it is necessary to descend into the brume of the various pleadings to explain this further.

76 In its original statement of claim – and all subsequent iterations of it up to and including the further amended statement of claim filed on 24 December 2019 (**FASOC**) – ASIC adopted the

formulation of "individually, collectively or in any combination" in respect of the various defined sets of information alleged for the purposes of the continuous disclosure contraventions. One example suffices. In the FASOC (at [29]), ASIC defined a set of information as: "(*individually, collectively, or in any combination*, the Fruit Box Agreement Information)" (emphasis altered).

77 In the second further amended statement of claim filed on 14 April 2020 (**2FASOC**), ASIC deleted the words "individually, collectively or in any combination" and replaced those words with the word "together" in respect of the various defined sets of information. This new formulation prevailed in a third further amended statement of claim filed on 18 June 2020 (**3FASOC**). In the 3FASOC (at [29]), for example, ASIC states: "(*together*, the Fruit Box Agreement Information)" (emphasis altered).

78 When it became apparent to ASIC that GetSwift was contending that this change represented a fundamental case shift, ASIC then sought to undo and reverse the amendments made in the 2FASOC in a proposed fourth further amended statement of claim (**4FASOC**) (which was circulated in June 2020), by reintroducing the deleted words "individually, collectively or in any combination". The application for leave to amend to make this change was heard during the trial, which I refused.

E.2 The application to amend

79 ASIC contended that it had sought to revert to the formulation adopted up to and including the FASOC in the proposed 4FASOC in response to submissions that had been made by GetSwift by way of opening. Relevantly, it was proposed to meet an argument that the word "together" in the 2FASOC had the consequence that ASIC had "to prove each individual element in itself was not generally available and more particularly was material".[68] Since this was not ASIC's case, and was said to have "never been the case",[69] ASIC explained that it had simply reinserted the previous formulation in the proposed 4FASOC to avoid ambiguity and make it clear that "there is a single contravention, but it may comprise any one or more of those elements".[70]

[68] T331.22–23 (Day 5).
[69] T331.23 (Day 5).
[70] T331.25–26 (Day 5).

80 Put in another way, ASIC contended that its case, as it had always been, was that it had to prove that "the information as a whole was not generally available and the information as a whole was material".[71]

81 As one might expect, GetSwift disagreed with ASIC's characterisation of the pleading. Its primary contention was that by attempting to reintroduce the deleted words in the proposed 4FASOC, ASIC was essentially resuscitating a case it had "abandoned" when it had filed the 2FASOC.[72] GetSwift asserts that leave to amend should be refused and that GetSwift should relevantly be held to the pleaded case as submitted in the 2FASOC and 3FASOC.

82 For example, GetSwift argued it would be unjust for ASIC to "reverse [a] deliberate forensic decision" previously taken absent adequate explanation; that GetSwift would suffer forensic prejudice; and that the amendment, went against the evidence of ASIC's own expert, Mr Molony.[73] GetSwift further contended ASIC had been afforded plenty of opportunities to amend and the delay in seeking the amendment after the commencement of the trial was particularly problematic.[74] Finally, GetSwift asserted that granting leave to amend could cause potential loss of public confidence in the legal system; and (less unrealistically) that such a course did not align with the parties' obligation to act in accordance with the overarching purpose referred to in Pt VB of the *Federal Court of Australia Act 1976* (Cth).

E.3 Relevant principles

83 Unsurprisingly, there was no dispute between the parties as to the applicable legal principles which do not require excursus, save for two propositions that deserve particular emphasis.

84 *First,* an abundance of authority confirms the need for precision in pleadings, particularly in cases involving allegations of misleading and deceptive conduct, or which involve the contravention of a civil penalty provision. Indeed, it is of the "utmost importance" that such cases be "finally and precisely pleaded": *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1998) 42 IPR 1 (at 4 per Foster J). Insisting on precise pleading in cases concerning allegations of misleading or deceptive conduct is not mere

[71] T331.36–38 (Day 5).
[72] T329.13–15 (Day 5).
[73] T325.12 (Day 5). See T328.43–329.5 (Day 5) and GCS at [9]–[24].
[74] See T329.9–23 (Day 5).

pedantry. A fair trial of allegations of contravention of law requires "the party making those allegations … to identify the case which it seeks to make and to do that clearly and distinctly": *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 (at 502 [25] per French CJ, Gummow, Hayne and Kiefel JJ).

85 *Secondly*, notwithstanding that the authorities make it clear that pleadings must be drafted with precision, this does not mean that one should lose sight of the fact that the fundamental purpose of pleadings is procedural fairness and ensuring that an opposing party is aware of the case that it is required to meet. Pleadings are a means to an end and not an end in themselves: see *Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 (at 292–293 per Dawson J); *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 (at 517 per Isaacs and Rich JJ); *Ethicon Sàrl v Gill* [2021] FCAFC 29 (at [687]–[689] per Jagot, Murphy and Lee JJ). The overarching consideration is always whether the opposing party knows the nature of the case they have to meet.

E.4 Pleadings and continuous disclosure cases

86 The real substance of the dispute is adapting and applying these general principles to the particular circumstances of this case.

87 Continuous disclosure cases often present challenges to a pleader. An important challenge, not present here, but present in class actions, is the deficiency in understanding at the outset of litigation the precise nature of the information within the knowledge of a disclosing entity at the time it is alleged that certain information should have been disclosed. This asymmetry of information is cured in ordinary civil cases by discovery or interrogation, which leads to frequent amendment in cases of this type. But that does not apply to the present case. Prior to commencement, the regulator had the means to procure the necessary information to allow it then to make wholly informed decisions as to how the information alleged to be material was to be identified and then pleaded.

88 However, another common challenge was present. It arises because, as explained below, the whole obligation to make continuous disclosure focuses upon the concept of "information". It is information that is not generally available; and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the relevant securities that must be notified. Several questions arise, the underlying thrust of which is the need to understand the content of the information said to enliven the obligation to disclose. Most obviously, there is a need to examine:

(1) When can it be said that an entity has the information?

(2) When is the information generally available?

(3) When would a reasonable person expect that information to have a material effect on the price or value of the relevant securities?

89 Identifying the relevant information, proving it existed, and also proving it was not generally available and material is fundamental. What is also evident is that in cases of any complexity, there are aspects of the information that are integral and other aspects that might be described as peripheral or supplementary and may not, in and of themselves, be material. An illustration of this can be seen by reference to the *James Hardie* litigation, in which the question considered here arose in a different context; that is, whether it is each individual element *or* the information as a whole that must be found to have not been generally available.

90 In *Australian Securities and Investments Commission (ASIC) v Macdonald (No 12)* [2009] NSWSC 714; (2009) 259 ALR 116, it was held that a James Hardie entity, JHINV, had failed to notify the ASX of the relevant information (defined as the **ABN 60 Information**) in an identified period. In doing so, it had contravened s 674 of the *Corporations Act*. The ABN 60 Information was defined as consisting of a number of distinct elements, including (at [201] per Gzell J):

(1) the execution of a deed of covenant, indemnity and access (**DOCIA**) by JHINV and another James Hardie entity, JHIL;

(2) the issue of 1000 shares by JHIL to the ABN 60 Foundation; and

(3) the cancellation by JHIL of its one fully paid share owned by JHINV for no consideration.

91 In the Court of Appeal of New South Wales, a dispute arose as to whether some aspects of the ABN 60 Information had, in fact, been generally available: *James Hardie Industries NV v Australian Securities and Investments Commission (ASIC)* [2010] NSWCA 332; (2010) 274 ALR 85. JHINV contended that it had made available all of the information in a public report, absent the first element (i.e. the indemnity in the DOCIA). It therefore argued that the information required to be disclosed had been "readily available" within the meaning of s 676(2) of the *Corporations Act*. In this way, JHINV's case was that, with the exception of one element, the information had been disclosed and was thus "generally available".

92 This case was rejected by the Court (at 198 [545]) on the basis that the DOCIA was such *an integral part* of the ABN 60 Information that its absence from the public report meant that there had been no relevant disclosure of the ABN Information. The fact that an integral part of the defined information was not generally available was sufficient to find that there had been no disclosure of the pleaded information as a whole, notwithstanding that other elements of the information were generally available.

93 Here, absent an overly-technical literal reading, any common sense review of the pleading reveals that the material information has been pleaded in such a way as to make it sufficiently evident that some aspects or individual components of the information could not of themselves be material (although they were of significance contextually), whereas some aspects are integral in assessing whether the information not generally available, as a whole, was material.

E.5 Consideration

94 Informed by the above principles and the reality that omitted "information", if it is of any complexity, will almost always have different components with different degrees of importance, I am unpersuaded by GetSwift's contention that ASIC has pleaded a case that requires it to prove that each individual element of the pleaded categories of information, however marginal, was not generally available and was material.

95 ASIC's pleaded case has been substantively consistent throughout the proceeding and was well understood by GetSwift. It is notable that no *evidence* was adduced indicating directly that those advising GetSwift were labouring under any misapprehension as to the nature of ASIC's case and made any specific forensic decision based upon such a misapprehension. The reason why there was no such direct evidence is tolerably clear – there was no real misunderstanding and I expect no solicitor could conscientiously swear to the contrary.

96 GetSwift says it made it "expressly clear in its opening submissions that it was holding ASIC strictly to its pleaded case and that it did not acquiesce in the conduct of any trial beyond the pleaded case",[75] and it otherwise made that position clear in the course of the trial. So much may be true, but that is beside the point. GetSwift knew the case it had to meet. To the extent that any of the various iterations of ASIC's written pleadings were vague or unclear, by way

[75] GOS at [18]; GCS at [9].

of opening, on 18 June 2020, Mr Halley SC, senior counsel for ASIC, who was not in the case when it was originally pleaded, explained that Mr Darke SC, who appeared for GetSwift:

> wishes to advance a case that, if your Honour is not satisfied that every single element is not generally available and every single element, in themselves, is not material, then we fail. And we reject that, understandably, out of hand.
>
> …
>
> [T]hat's why we moved away from the individually or collectively or in any combination pleading, because that's not our case. Our case is that the information as a whole was not generally available and the information as a whole was material.[76]

97 The substance of ASIC's pleaded case was again articulated and clarified when ASIC applied to the Court for leave to amend its pleadings on 22 June 2020. I asked the following question of Mr Halley:

> [D]o you contend … that ASIC's case is that the contraventions of section 674(2) will be established if the individual elements of the information, as pleaded, taken together, were not generally available and were material in the requisite sense that ASIC intends to convey and continues to maintain that ASIC's case will not fail if ASIC is not able to establish in that, in isolation, any individual element of the defined information was generally available or any individual element of the defined information was not material in the requisite sense?[77]

98 He responded with a definitive "yes".

99 If this still was not clear, or questions remained as to whether ASIC had maintained a consistent pleaded case throughout these proceedings, Mr Halley further explained on 14 August 2020 that:

> But what the defendants have done, it seems, is to seek to pick off individual elements or sub-elements or sub-sub-elements and say, "Well, you failed on that. You haven't proved that … in isolation is material. Therefore, your case must fail with respect to that allegations of contravention of 674(2)." We say that's not the case that ASIC has advanced, not the case that ASIC has pleaded and not the case that ASIC has otherwise opened, closed and conducted the case on.[78]

100 Although ASIC took a reactive step to ensure that its case did not ultimately fail on the basis of a technical point, the proposed 4FASOC was consistent with the case it had run from the outset. Of the reasons why I denied leave to amend is that the proposed amendment identified

[76] T232.30–45 (Day 4).
[77] T331.31–40 (Day 5).
[78] T1076.25–1076.30 (Day 17).

a case that ASIC did not wish to run, and one which would have produced an absurdity if it was read literally (as GetSwift was determined to do). As GetSwift correctly pointed out, the introduction of the words "in any combination" in the proposed amendments had the effect, again if read literally, of vastly multiplying the number of cases on materiality which it would be required to meet. Indeed, GetSwift engaged in a mathematical exercise to work out the number of permutations that a case of this nature would encompass.[79] For example, in respect of the NAW Projection Information, there were 18 separate items of information. Thus, the number of possible different combinations which could comprise the defined piece of information would be 262,143. Of course, this was all a bit silly because this was never ASIC's case. That is why, in the circumstances, I disallowed the amendments and refused leave for ASIC to amend its pleadings during the trial. In my view, there was no need for ASIC to amend its pleadings in the circumstances or to clarify further its case by reformulating its pleadings once again. Despite the various iterations of its pleadings, ASIC maintained at trial the same case that it had maintained from the beginning: if the elements of the information it identified were proved at trial to be not generally available and material, and those elements (taken as a whole) were proved not to have been disclosed, then contravening conduct took place.

101 Contrary to GetSwift's submissions, ASIC did not make any deliberate forensic decision to abandon an earlier aspect of its case. ASIC's initial pleading may have been somewhat maladroit and its approach to this issue by serial amendment and proposed amendment may have been less than ideal, but I reject any notion that there has been any want of procedural fairness provided to the defendants in this regard. They all knew the case they needed to meet and proceeded to conduct their defence accordingly. In all the circumstances, it is quite understandable why this pleading point would be taken by the defendants, but in the absence of any proven prejudice, it is devoid of substantive merit.

F APPROACH TO FACT FINDING

102 Before making factual findings, it is appropriate to address a number of preliminary issues as to the correct approach that I should adopt.

[79] GOS at [41].

F.1 The nature of the contest at trial

103 In *Webb v GetSwift Limited (No 5)* [2019] FCA 1533, I noted the following about the process of fact finding (at [17]–[18]):

> 17. As those experienced in commercial litigation in general, and in securities class actions in particular, would readily appreciate, what matters most in the determination of the issues in cases such as this is **the analysis of such contemporaneous notes and documents as may exist and the probabilities that can be derived from these documents and any other objective facts.** Take the example of the dealings between GetSwift and the customers: there is likely to be a documentary record both within the business records of GetSwift and their contractual counterparty which records dealings between them which go beyond the agreement itself. Additionally, experience suggests that it is also likely that there will be informal email exchanges, both between GetSwift and the customers, and within the relevant organisations.
>
> 18. As Leggatt J said in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) at [15]–[23], there are a number of difficulties with oral evidence based on recollection of events given the unreliability of human memory. Moreover, considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. As his Lordship noted, a witness is asked to make a statement, often when considerable time has already elapsed since the relevant events. The statement is usually drafted by a solicitor who is inevitably conscious of the significance for the case of what the witness does or does not say. The statement is often made after the memory of the witness has been "refreshed" by reading documents. The documents considered can often include argumentative material as well as documents that the witness did not see at the time and which came into existence after the events which the witness is being asked to recall. It may go through several iterations before it is finished. As Lord Buckmaster famously said, the truth "may sometimes leak out from an affidavit, like water from the bottom of a well". This may be overly cynical, but the surest guide for deciding the case will be as identified by Leggatt J at [22]:
>
> > … the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on the witnesses' recollections of what was said in meetings and conversations, and to **base factual findings on inferences drawn from the documentary evidence and known or probable facts**.
>
> (Emphasis added).

104 As the Full Court recently observed in *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 (at [239] per Allsop CJ, Besanko and Middleton JJ), this approach might be best seen as a helpful working hypothesis rather than something to be enshrined in any rule or general practice of placing little reliance on recollections of conversations.

105 In the present case, the helpful working hypothesis of paying close regard to the contemporaneous documents is of importance. However, the factual issues are not in

substantial contest between the parties; what is in contest are the inferences and conclusions (both factual and legal) that are to be drawn from contemporaneous communications.

106 In accordance with this view, the factual findings that I will make are made upon a mixture of the agreed facts between the parties, material drawn from contemporaneous documents, witness and affidavit evidence (which, as I noted earlier, has largely not been challenged in a significant way), as well as inferences drawn from any documents or statements.

F.2 The principled approach to fact finding

107 Leaving aside the significance of the choice of GetSwift and the directors not to call witnesses, which I will deal with separately, both ASIC and GetSwift and the directors made a number of general submissions relating to the approach that the Court should take in respect of fact finding, to which it is appropriate to make a general response.

F.2.1 *Affidavits and the documentary case*

108 ASIC noted that the evidence contained in the affidavits of its witnesses had remained in large part uncontested. As a consequence, it argued that in making conclusions of fact and drawing relevant inferences, I should rely on the totality of the unchallenged affidavit evidence adduced before this Court.

109 In some cases, including regulatory cases, affidavits need to be approached with some caution as they are often less the authentic account of the lay witness, but rather an elaborate construct, being the result of legal drafting (Lord Woolf MR, *Access to Justice Report, Final Report* (HMSO), 1996 (at Ch 5, [55])). However, I accept that as a general proposition unchallenged evidence that is not inherently incredible ought to be accepted by the tribunal of fact: *Precision Plastics Pty Limited v Demir* (1975) 132 CLR 362 (at 370–371 per Gibbs J, Stephen J agreeing, Murphy J generally agreeing); *Ashby v Slipper* [2014] FCAFC 15; (2014) 219 FCR 322 (at 347 [77] per Mansfield and Gilmour JJ).

110 Although, of course, unchallenged evidence can be rejected if it is contradicted by facts otherwise established by the evidence or particular circumstances point to its rejection, the affidavits, speaking generally, were consistent with the documentary case of ASIC.

111 As to the documentary case, ASIC placed reliance upon the well-known principle that "all evidence is to be weighted according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted": *Blatch v Archer* (1774) 1 Cowp

63 (at 65 per Lord Mansfield), cited with approval in *Weissensteiner v The Queen* (1993) 178 CLR 217 (at 225 per Mason CJ, Deane and Dawson JJ).

112 Why this is of importance in the present case is a little unclear to me. Although GetSwift had the power to adduce what documents it wished to rely upon to qualify or contradict the conclusions ASIC contends should be drawn from the documentary evidence, ASIC is not an ordinary litigant. It is in the privileged position of having compulsory production powers and can, in this sense, marshall the material it contends is relevant to its case. There was no suggestion that GetSwift had not given full and complete discovery of all documentary evidence following the extensive compulsory document production to ASIC.

F.2.2 *The oral evidence generally*

113 In addition to stressing, correctly, that the documentary record remains the best foundation for the finding of facts in this case, ASIC asserted that the Court should be cautious about a number of answers in cross-examination where the cross-examiner pressed the witness on accepting the "possibility" that something may have occurred or been said or the "possibility" that some matter could not be ruled out (being an event or comment that was inconsistent with ASIC's account).

114 A witness' refusal to rule out a "possibility", including a hypothetical one, about whether a particular event or conversation occurred was a feature of the evidence. There is a risk of over generalisation in submissions of this type. However, to the extent it is useful in speaking in generalities, confronting a witness with the *possibility* that an event may have occurred and the witness accepting it as a *possibility*, is not in itself proof that the fact did exist. It may rationally bear upon whether *all the evidence* pointing to the existence of the fact should be accepted (or whether ASIC has proved a different state of affairs existed); but these are distinct points.

115 As I will explain, a key difficulty for the defendants in challenging ASIC's case theory based on the documentary record (and the affidavits in relation to each Enterprise Client), is not only the general lack of challenge to the affidavit material, but the lack of any rational counter-narrative. The evidence as a whole in relation to each Enterprise Client suggests a course of events consistent with ASIC's allegations and this has been left essentially uncontradicted. This makes the picture emerging from the contemporaneous business records quite compelling. This comment does not amount, of course, to an inversion of onus, for reasons I will now explain.

F.2.3 *Burden and standard of proof*

116 Although they are foundational matters, it is worth setting out some basic principles as to proof and onus, which I have previously addressed in *Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCA 451; (2019) 286 IR 52 (at 59–61 [14]–[18]).

117 Much was made in ASIC's submissions about the defendants not calling witnesses and the limited (or lack of) substantial documentary tender, separate from those documents that formed part of ASIC's case.

118 None of these submissions can detract from the necessity for ASIC to prove its case on this liability hearing to the civil standard having regard to the degree of satisfaction required by s 140 of the *Evidence Act 1995* (Cth) (***EA***). This section requires the Court, in a civil proceeding, to find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities. In deciding, in a civil case, whether it is satisfied that the case has been proved, the Court is to take into account: (a) the nature of the cause of action or defence; (b) the nature of the subject-matter of the proceeding; and (c) the gravity of the matters alleged. Although the standard of proof remains the balance of probabilities, the degree of satisfaction varies according to the seriousness of the allegations made and the gravity of the consequences (if the allegations are found to be correct).

119 It is necessary to bear in mind that the factual allegations made by ASIC are not only foundations for the nature of the relief dealt with at this liability hearing (that is, declarations of contraventions), but are also the foundations for the deferred relief sought, that is, the imposition of pecuniary penalties and disqualification orders.

120 It was common ground, but nevertheless is worth stressing, that it is well-established that s 140 reflects the common law as explained seminally by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. As the Full Court noted in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* [2007] FCAFC 132; (2007) 162 FCR 466 (at 480 [30]–[32] per Weinberg, Bennett and Rares JJ):

> 30. The mandatory considerations which s 140(2) specifies reflect a legislative intention that a court must be mindful of the forensic context in forming an opinion as to its satisfaction about matters in evidence. Ordinarily, the more serious the consequences of what is contested in the litigation, the more a court will have regard to the strength and weakness of evidence before it in coming

to a conclusion.

31. Even though he spoke of the common law position, Dixon J's classic discussion in Briginshaw ... at 361-363 of how the civil standard of proof operates appositely expresses the considerations which s 140(2) of the [EA] now requires a court to take into account. Dixon J emphasised that when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. He pointed out that a mere mechanical comparison of probabilities independent of any belief in its reality, cannot justify the finding of a fact. But he recognised that (*Briginshaw* 60 CLR at 361-262):

> 'No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. ...

32. Dixon J also pointed out that the standard of persuasion, whether one is applying the relevant standard of proof on the balance of probabilities or beyond reasonable doubt, is always whether the affirmative of the allegation has been made out to the reasonable satisfaction of the tribunal. He said that the nature of the issue necessarily affected the process by which reasonable satisfaction was attained. And, so, he concluded that in a civil proceeding, when a question arose whether a crime had been committed, the standard of persuasion was the same as upon other civil issues. But he added, weight must be given to the presumption of innocence and exactness of proof must be expected (*Briginshaw* 60 CLR at 362-363).

121 As the defendants rightly stress, there is no doubt that the so-called "*Briginshaw* principles" apply to civil penalty proceedings (which is a particular example of the application of s 140(1) of the *EA*): see *Adler v Australian Securities and Investments Commission (ASIC)* [2003] NSWCA 131; (2003) 179 FLR 1 (at 29–30 [142]–[148] per Giles JA); *Whitlam v Australian Securities and Investments Commission* [2003] NSWCA 183; (2003) 57 NSWLR 559 (at 592 [117]–[119] per Hodgson, Ipp and Tobias JJA).

122 It follows that, for ASIC to succeed, I am required to reach a state of satisfaction or an actual persuasion that it has proved its allegations of contravention, while taking into account the seriousness of the allegations and the gravity of the consequences that could follow if the

allegations were to be accepted. Having said this, although the fact that this is a civil penalty proceeding is of real importance, when one comes to considering the "gravity of the matters alleged", the focus is upon the particular factual allegations in the case, not an examination of the cause of action or issues at a level of abstraction. This makes sense when one considers that the focus on the gravity of the finding is linked to the notion that the Court takes into account the inherent unlikelihood of the alleged conduct, and common law principles concerning weighing evidence: see *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 (at 576 [137]–[138] per Branson J); *Briginshaw* (at 361–362 per Dixon J).

F.3 *Jones v Dunkel* and Civil Penalties

123 Having stressed the nature of the burden that rests always on ASIC in relation to its allegations, I now turn to how, as the trier of fact, I am to deal with the election of GetSwift and the directors not to go into evidence (leaving aside the tender of a few miscellaneous documents). More specifically, it is necessary to deal with the question as to how this absence of evidence is to be assessed, if at all, in the determination as to whether I have reached the required standard of reasonable satisfaction or actual persuasion required to sustain ASIC's case.

124 As is perhaps predictable, ASIC submits that I should infer that the evidence of the absent witnesses would not have assisted the defendants' respective cases, and that I may draw any adverse inference unfavourable to the defendants with greater confidence in the light of their absence.

125 There is no need for me to rehearse the relevant principles in any great detail. They were explained by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Australian Securities and Investments Commission (ASIC) v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 (at 412–413 [165]–[167]). As Heydon, Crennan and Bell JJ succinctly observed a year earlier in *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 (at 384–385 [63]–[64]):

> 63. The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn. …
>
> 64. The rule in *Jones v Dunkel* permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have

assisted the party.

(Citations omitted).

126 As I also noted in *Patrick* (at 61 [21]), the availability of such inferences in the context of civil penalty proceedings has been the subject of some discussion. Ultimately, however, authority supports the proposition that inferential *Jones v Dunkel* reasoning is applicable to proceedings (such as the present) that involve a claim for the imposition of a civil penalty and a reliance on the privilege against civil penalties: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia* (at 490–491 [76] per Weinberg, Bennett and Rares JJ); *Adams v Director of the Fair Work Building Industry Inspectorate* [2017] FCAFC 228; (2017) 258 FCR 257 (at 302 [147] per North, Dowsett and Rares JJ). The reason why this is so was explained by Giles JA (Mason P and Beazley JA agreeing) in *Adler v ASIC*. After noting (at 147 [659]) that proceedings brought under the civil penalty provisions in the *Corporations Act* "are not to be equated with provisions for criminal offences", his Honour observed as follows (at 147 [660]–[661]):

> 660. When civil procedures have been adapted in civil penalty cases, it has not been because of equation with a criminal trial. It has been because of the privilege against exposure to penalties. As was pointed out in [*Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543] at [13], the privilege against exposure to penalties has its origin in the rules of equity relating to discovery, although it has become a principle of the common law. While it was said at [31] that the privilege against exposure to penalties today "serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it", from the context and citation of *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 129 regarding the privilege as a reflection of the privilege against self-incrimination, that fell well short of equating proceedings for civil penalties with criminal proceedings.
>
> 661. In the end the argument must be that it would not be consistent with this stance against self-incrimination for an inference adverse to the person from whom a civil penalty is claimed to be drawn because of the failure of the person to give evidence. That reasoning did not find favour in *RPS v The Queen*, in which the "right to silence" was not thought to be a useful basis for reasoning (at [22]). To say that a person cannot be forced to give evidence against himself, by providing discovery or answering interrogatories or, in a criminal context, making a statement to the police, says little when it comes to the giving of evidence in the person's own case. In ordinary civil proceedings the defendant cannot be forced to give evidence in his own case. Civil penalty proceedings are no different in that respect. In my opinion, it was open for *Jones v Dunkel* inferences to be drawn against Mr Adler, Adler Corporation and Mr Williams in these proceedings.

127 See also a detailed discussion of the relevant authorities in *Chong & Neale v CC Containers Pty Ltd* [2015] VSCA 137; (2015) 49 VR 402 (at 465–470 [213]–[229] per Redlich, Santamaria

and Kyrou JJA) referred to by the Full Court in *Adams* (at 302 [147]), and which I summarised in *Patricks* (at 61–63 [22]–[24]).

128 The issue of principal controversy in this case is that GetSwift submits that I am not entitled to draw any *Jones v Dunkel* inference *against it* for a failure to call its directors, given that they are parties and have the benefit of the penalty privilege. It was said that in such circumstances, GetSwift could not have compelled its directors to give evidence and it is "up to them to make their own decision for their own reasons as to whether to give evidence or not".[80] The submission was developed as follows.

129 It was said, correctly, that the potential application of the principle depends upon a number of threshold matters. One of these is that one party would be reasonably expected to call the missing witness where the missing witness is in the party's "camp": see *RPS v Queen* [2000] HCA 3; (2000) 199 CLR 620 (at 632 [26] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ). Although implicitly accepting, as it must, that this threshold matter is met in the case of its directors, GetSwift submits that such a matter "has no application" to it in circumstances where Mr Macdonald, Mr Hunter and Mr Eagle each was entitled to the privileges they invoked against exposure to civil penalties.[81] As it was put in GetSwift's closing written submissions, the existence of the privileges, and the individuals' unwillingness to give them up, provide an explanation for GetSwift not calling those witnesses and, in these circumstances, no *Jones v Dunkel* inferences can be drawn against GetSwift.[82]

130 Despite GetSwift's contention that this submission is "so obvious that it probably goes without saying",[83] this issue has caused me some pause. One of the reasons for that pause is the unusual circumstances of the representation in this case. During the course of oral submissions on this issue, I sought clarification as to the position in regard to the instructions given to GetSwift. As I have noted above, at the trial, each defendant was represented by separate teams of counsel. This was, with respect, entirely appropriate given the way the cases of the separate defendants were run. However, this arrangement was not consistent throughout the proceeding. Initially, from when the proceeding was commenced on 22 February 2019, up until April 2020,

[80] T1147.22–26 (Day 17).
[81] GCS at [56].
[82] GCS at [57].
[83] T1147.25 (Day 17).

some two months out from the trial, GetSwift, Mr Hunter and Mr Macdonald were are all represented by the same team of counsel. Moreover, throughout the entire life of the proceeding, each of those defendants has instructed the same firm of solicitors.

131 In this regard, senior counsel for ASIC, Mr Halley, brought my attention to the following two oral submissions of Mr Darke for GetSwift. The *first* submission occurred during the course of argument on an application moved on by the defendants on 9 April 2020 seeking an adjournment of the trial:

> [T]here has been no answer, nor there could be, in fairness to my friends, to the difficulty that Mr Macdonald and Mr Hunter can't come to Australia for this trial in the current circumstances. And, as a result, they can't properly give real time instructions to GetSwift, on behalf of GetSwift.[84]

132 The *second* submission occurred on 17 June 2020, on the third day of the trial. During discussions about procedural matters as to the calling of witnesses, Mr Darke said the following:

> I should make it clear that I will be suffering from the same difficulties as Mr Finch, in the sense that Mr Hunter is my chairman and a director, and I would be cross examining about conversations involving Mr Hunter of which Ms Gordon is now going to be giving evidence orally, and because it is midnight in New York as Ms Gordon will be giving her evidence-in-chief, by leave tomorrow, I just won't be able to get Mr Hunter's instructions.[85]

133 In further supplementary written submissions filed on 6 October 2020 after the hearing, pursuant to leave granted by me on the last day of the trial,[86] GetSwift provided the following clarification as to the instructions it says were given to it, and the roles played by Messrs Hunter and Macdonald in the giving of those instructions (at [2]–[4]):

> 2. Since March 2020, GetSwift, Mr Hunter and Mr Macdonald have been represented by different counsel. Since that time, the position as to the giving of instructions on behalf of GetSwift has been as follows:
>
> a. Instructions as regards the conduct of the proceedings have been given by the Company Chair, Stan Pierre-Louis (a US qualified attorney and former Associate General Counsel of Viacom).
>
> b. Mr Hunter and Mr Macdonald have provided instructions in relation to factual matters, as two people involved in the relevant events.

[84] T19.21–25 (9 April 2020). See also T1224.22–1224.25 (Day 18).
[85] T219.21–26 (Day 3). See also T1226.5–11 (Day 18).
[86] T1227.10–11 (Day 18).

c. Mr Hunter and Mr Macdonald have had no individual authority to control the conduct of the Company's defence or, for instance, to resolve the proceedings on behalf of the Company.

3. Consistently with the above, the statements made by Mr Darke, referred to at T1224.22-25 and T1226.5-11, concerned Mr Hunter and Mr Macdonald giving instructions as to factual matters in which they were involved, not as to the conduct of the proceedings on behalf of GetSwift.

4. As to the fact that Quinn Emanuel (**QE**) have remained solicitors on the record in respect of all three defendants, it is not unusual for a common firm of solicitors to engage different counsel to represent the distinct and potentially conflicting interests of different clients. That is what has occurred in this case. It is something that may occur, despite the clients having divergent interests, in a range of circumstances, including where there is informed consent.

(emphasis in original).

134 ASIC contends that I ought to reject the above submission and conclude that Mr Hunter and Mr Macdonald relevantly provided instructions to GetSwift that were not limited to "factual matters". It was contended that the above submission is difficult to reconcile with what was said by Mr Darke as set out above, particularly Mr Darke's reference to Mr Hunter being "my chairman and a director" and the absence of any reference to Mr Pierre-Louis in the course of the "extensive" submissions made by Mr Darke on those occasions.

135 Although there is some real force in ASIC's submissions, ultimately the issue is not one I have to determine. That is because, in any event, the question of whether a *Jones v Dunkel* inference is available to be drawn is not answered by the precise nature of the instructions given by Mr Hunter and Mr Macdonald.

136 Where the circumstances support *Jones v Dunkel* inferences being available against a party claiming the privilege, it might be thought that such inferences should be available against a company whose directors have claimed the privilege. In this sense, as ASIC emphasised, Messrs Hunter and Macdonald are the directing mind and will of the company and as such their intentions are to be attributed to the company under orthodox principles of agency: see *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd* [1915] AC 705 (at 713 per Viscount Haldane); *HL Bolton (Engineering) Company Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (at 172 per Denning LJ); *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (at 171 per Lord Reid, at 180 per Lord Morris, at 187 per Viscount Dilhorne, and at 190 per Lord Pearson); *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; (2016) 249 FCR 421 (at 445 [95] per Edelman J, Allsop CJ and Besanko J agreeing).

137 In such circumstances, it may appear that the rationale for the proposition that directors are themselves subject to an available *Jones v Dunkel* inference, should support the conclusion that the company should be so subject. Surprisingly, the parties were unable to assist me with reference to any authority on this point. I do note, however, the judgment of Giles JA (with whom Mason P and Beazley JA agreed) in *Adler v ASIC*. In that case, ASIC had instituted civil penalty proceedings against three former directors of HIH Insurance Ltd, and a fourth defendant, Adler Corp Pty Ltd, a company of which Mr Adler was the sole director and he and his wife the only shareholders. Pecuniary penalty orders were sought, and, although appearing not to have expressly claimed penalty privilege, as Austin J noted in *Australian Securities and Investments Commission v Rich (ASIC)* [2009] NSWSC 1229; (2009) 236 FLR 1 (at 99 [460]) the defendants were protected by that privilege, even before the High Court held in *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 that the privilege extended to civil penalty proceedings seeking disqualification orders.

138 I have referred above to Giles JA's judgment in *Adler v ASIC* being authority for the proposition that *Jones v Dunkel* inferences are available to be drawn in civil penalty proceedings. During the course of considering, and dispatching, a submission put on appeal to the contrary, his Honour observed (at 147 [661]) that in his opinion "it was open for *Jones v Dunkel* inferences to be drawn against Mr Adler, *Adler Corporation* and Mr Williams in these proceedings" (emphasis added). With respect to his Honour, it is not entirely clear to me that such inferences were in fact drawn by the primary judge against Adler Corporation in that case. In this regard, I am not sure I agree with Giles JA (at 146 [653]), when his Honour observed that: "it is clear enough that the trial judge drew *Jones v Dunkel* inferences against Mr Adler (and Adler Corporation) and Mr Williams" (although his Honour was, with respect, undoubtedly correct to note that "it is not always clear whether the inferences were of importance or were no more than supportive of conclusions to which the trial judge came in any event"). On this basis, it is somewhat of an overstatement to contend that *Adler v ASIC* unqualifiedly supports the submission of ASIC that such inferences are available to be drawn against GetSwift.

139 Given the closeness of the relationship and the central importance of the evidence of Mr Hunter and Mr Macdonald (the two absent potential witnesses the subject of ASIC's contention), the real focus must be on whether GetSwift has identified a reasonable excuse for not calling them. I am sceptical of the notion that a reasonable excuse has been demonstrated. It is reasonable to infer that those acting for GetSwift knew exactly the evidence that, if called, Mr Hunter and Mr Macdonald would give. It is artificial in evaluating the question of reasonable excuse in

this case as if one were dealing with persons who were not the controlling minds of the entity which could have called them. Significance attaches in favour of the drawing of such inferences to the fact that the witnesses here were the company party's directors were closely engaged in the transactions in question: see *Dilosa v Latec Finance Pty Ltd (No 2)* [1966] 1 NSWR 259; (1966) 84 WN (Pt 1) (NSW) 557 (at 582 per Street J). Moreover, if one was to accept that if those acting for GetSwift wanted Mr Hunter and Mr Macdonald to give evidence but that they were reluctant or unwilling to do so absent compulsion (again a highly questionable premise in the absence of evidence), it was open to GetSwift to subpoena them – it cannot be suggested that they would be calling them "cold". Of course, they could have taken objections to giving particular evidence, but the Court would have then been required to determine whether or not there were reasonable grounds for the objection and might have required the giving of particular evidence in conformity with s 128 of the *EA*.

140 In any event, all of this is merely an interesting diversion. It does not matter to the substance of this case. As will become evident below, the facts emerging from the contemporaneous business records that form part of the documentary case against GetSwift are sufficiently compelling as not to require resort to the drawing of inferences based upon the absence of evidence being adduced by GetSwift from Mr Hunter and Mr Macdonald. When making findings as to ASIC's case against GetSwift, I will not draw upon *Jones v Dunkel* inferential reasoning. This is consistent with the notion that even if such reasoning were available – contrary to GetSwift's submissions – there is no compulsion on the trial judge to draw any *Jones v Dunkel* inferences: *Manly Council v Byrne* [2004] NSWCA 123 (at [52] per Campbell J, Beazley JA and Pearlman AJA agreeing); *Howell v Macquarie University* [2008] NSWCA 26 (at [97]–[98] per Campbell JA, Spigelman CJ and Bell JA agreeing); *CSG Limited v Fuji Xerox Australia Pty Ltd* [2011] NSWCA 335 (at [82] per Sackville AJA, Bathurst CJ and Campbell JA agreeing).

G FACTUAL BACKGROUND IN RESPECT OF GETSWIFT'S CLIENTS AND SHARE PLACEMENTS

141 I now turn to the relevant factual background. Given the scope of ASIC's case, the number of Enterprise Clients involved, the period of contravention and the reliance on the documentary record, this section of the reasons is almost interminable and reading it will no doubt almost be as wearisome as writing it. Regrettably, given the need as a trial judge to make all relevant findings of fact, the task needs to be undertaken.

142 To trudge through the material, I will deal with the chronology of each Enterprise Client individually. In doing so, I attempt to paint the objective picture of what occurred in respect of GetSwift's dealings with each Enterprise Client. In this process, I am making findings as to the occurrence and content of the communications and oral evidence given. This means that when I refer to evidence given by a witness or refer to a denial made by a witness, I am making a finding of fact that I accept the relevant evidence of the witness and I accept the accuracy of the denial. As noted above, this is not a case where third party witnesses were challenged on their credit in any extensive way, but that is not to say that the quality of their recollection was not explored and sometimes doubted. Needless to say, when making the findings I have made, I have taken into account my assessment of the whole of the evidence, including challenges to their recollection (such as they were) during cross-examination.

143 Of course, this process of fact finding is sometimes complicated by the amount of disputation between the parties, and where appropriate, I have resolved issues of dispute. For the most part, however, I have prefaced the key points of controversy which form part of the alleged contraventions, and will make findings in respect of these points of controversy in the relevant sections which follow.

144 Finally, I should note by way of introduction to this section that I have, where necessary for context and sequence, included the times at which emails have been sent. Those times are in AEST or AEDT (as relevant) and are not necessarily the time that appears on the original email, given a large number were sourced from servers in the United States.

G.1 The Enterprise Clients

G.1.1 Fruit Box

145 Fruit Box Group Pty Ltd (**Fruit Box**) is a delivery company distributing fresh fruit, milk and vegetables to workplaces in capital cities around Australia and major regional cities.[87]

[87] Affidavit of Martin Leigh Halphen sworn 20 September 2019 (**Halphen Affidavit**) (GSW.0009.0030.0001_R) at [6]; Affidavit of Veronika Mikac affirmed 19 September 2019 (**Mikac Affidavit**) (GSW.0009.0041.0001_R) at [6]; Affidavit of Ciara Fionnuala Dooley sworn 20 September 2019 (**Dooley Affidavit**) (**GSW.0009.0016.0001_R**) at [6].

The development of the Fruit Box Agreement

146 On 9 November 2016, Ms Veronika Mikac, Head of Information, Communication and Technology (**ICT**) at Fruit Box, executed a term sheet between Fruit Box (then known as Box Corporate) and GetSwift.[88] From around that time, GetSwift worked to customise its platform to meet Fruit Box's requirements.[89]

147 On 9 February 2017, Mr Martin Halphen, CEO of Fruit Box, Ms Mikac, and Mrs Ciara Dooley (also known as Ciara Maslak), National Logistics Manager at Fruit Box, met with Mr Macdonald and Mr Hunter.[90] The purpose of the meeting was for Mr Halphen to observe a demonstration of the GetSwift Platform and also to discuss the proposed term sheet between Fruit Box and GetSwift, which Mr Halphen had reviewed prior to the meeting.[91] At the meeting, Mr Macdonald gave Mr Halphen a demonstration of the GetSwift Platform,[92] and Mr Halphen told Mr Hunter and Mr Macdonald that Fruit Box would trial the product but that any contract would be subject to the outcome of the trial.[93] There was also some discussion as to the number of deliveries performed by Fruit Box.[94] Mr Halphen could not recall a discussion about Fruit Box's rate of growth, but accepted that it was likely discussed.[95] He also deposed that he did not give anyone at GetSwift "any *specific* estimate of Fruit Box's annual delivery growth".[96] Ms Mikac stated that she could not recall whether there was a discussion about Fruit Box's rate of growth;[97] and Ms Dooley similarly could not recall anything about the meeting other than Mr Hunter and Mr Macdonald providing a demonstration of the GetSwift Platform.[98] Moreover, during the meeting, Mr Hunter discussed making an announcement to the ASX at the time of signing the contract, but Mr Halphen told Mr Hunter that this was not appropriate

[88] GSWASIC00065923; Mikac Affidavit (GSW.0009.0041.0001_R) at [17].
[89] T365.45–355.13 (Day 6); T376.1–45 (Day 6). See also SWI00111375; SWI00109201; GSWASIC00027870.
[90] Halphen Affidavit (GSW.0009.0030.0001_R) at [12]; Mikac Affidavit (GSW.0009.0041.0001_R) at [20]; Dooley Affidavit (GSW.0009.0016.0001_R) at [17].
[91] Halphen Affidavit (GSW.0009.0030.0001_R) at [13]; T426.4–18 (Day 6); T440.24–37 (Day 7).
[92] GSWASIC00027060; Halphen Affidavit (GSW.0009.0030.0001_R) at [12]–[15]; Mikac Affidavit (GSW.0009.0041.0001_R) at [20]–[23]; Dooley Affidavit (GSW.0009.0016.0001_R) at [17].
[93] Halphen Affidavit (GSW.0009.0030.0001_R) at [14].
[94] T433.45–434.4 (Day 6); T441.7–10 (Day 7).
[95] T433.45–434.8 (Day 6).
[96] Halphen Affidavit (GSW.0009.0030.0001_R) at [21(d)].
[97] T441.7–18 (Day 7).
[98] Dooley Affidavit (GSW.0009.0016.0001_R) at [17].

as the arrangement was to trial the product and he did not want any disclosure to occur.[99] He informed Mr Hunter and Mr Macdonald that he did not want any "PR" in relation to any agreement between GetSwift and Fruit Box and would review his position if Fruit Box's trial with GetSwift was successful.[100]

148 Following the meeting, Ms Mikac sent Mr Macdonald and Mr Hunter an email in which she: requested further details about what would happen after the proposed contract expired; indicated that Fruit Box and GetSwift would need to enter into a new term sheet (because the previous had expired on 31 January 2017); and stated that any promotion or marketing could be made after the product launch was successful and would be dealt with by Fruit Box's marketing manager.[101] She made clear that "Martin wants something more solid of [*sic*] what will happen after the contract expires".[102]

149 On 9 February 2017, after receiving the email from Ms Mikac, but before responding, Mr Hunter instructed Mr Scott Mison (GetSwift's company secretary) to draft an announcement concerning GetSwift's entry into an agreement with Fruit Box.[103] Mr Hunter stated: "It's a large contract – 3 year exclusive w 100+ k a month deliveries. We will decide on the timing for [Fruit] Box after the 1m notice".[104] The next morning, on 10 February 2017 at 6:07am, Mr Macdonald sent an email to Mr Mison (copied to Mr Hunter) in which he also asked Mr Mison to draft the announcement concerning GetSwift's entry into an agreement with Fruit Box and stated that the agreement "represents more than 1.5 million deliveries that will be transacted on the getswift [*sic*] platform per year".[105]

150 On 10 February 2017, Mr Macdonald sent an email to Ms Mikac (copied to Mr Hunter) in which he identified negotiating points for the agreement including that the "Limited Roll Out period" would expire on 1 March 2017 and the agreement would have an "Opt out clause" whereby the Fruit Box Group had until 8 March 2017 to opt out of the agreement.[106] Further,

[99] Halphen Affidavit (GSW.0009.0030.0001_R) at [15].
[100] Mikac Affidavit (GSW.0009.0041.0001_R) at [23(b)].
[101] GSWASIC00027060.
[102] GSWASIC00027060.
[103] GSWASIC00027054.
[104] GSWASIC00027054.
[105] GSWASIC00027018.
[106] GSWASIC00027008.

Mr Macdonald stated that there would be an "[o]ption to renew terms after agreement expires in 3 years for Martin's piece of mind [*sic*]" and that he was "happy to agree on pricing for the follow on 3 years".[107] Mr Halphen agreed in cross-examination that he wanted some certainty as to pricing after the term of the proposed term sheet between Fruit Box and GetSwift had expired.[108]

151 Between 10 February and 15 February 2017, Mr Macdonald negotiated the agreement with Ms Mikac (with Mr Hunter copied on the emails).[109] During the negotiations, Mr Macdonald proposed the trial period end on 1 March 2017 and Ms Mikac requested that the trial period end at a later date, on 1 April 2017.[110] Mr Macdonald accepted Ms Mikac's proposal.[111]

152 On 16 February 2017, Mr Mison sent an initial draft of the proposed Fruit Box announcement to Mr Hunter (copied to Mr Macdonald).[112] This draft contradicted itself insofar as it stated that Fruit Box conducted 30,000 deliveries of fruit boxes and 25,000 deliveries of milk both per month and per week.[113]

153 Also on 16 February 2017, Ms Mikac emailed Mr Macdonald (copied to Mr Hunter) about the maximum price that would be charged towards the end of the contract term if Fruit Box's deliveries increased.[114] In that email Ms Mikac stated: "As we already deliver 120K per month which is your max tier, if by the end of the contract we are up at 200k deliveries we wouldn't go more than that we are paying".[115]

154 Mr Halphen agreed in cross-examination that Ms Mikac had discussed her email to Mr Macdonald with him prior to sending it,[116] and that he did not want Fruit Box to be exposed to a price increase if it exercised the option to renew in the proposed term sheet with GetSwift.[117]

[107] GSWASIC00027008.
[108] T429.23–26 (Day 6).
[109] GSWASIC00026881 attaching GSWASIC00026884; GSWASIC00026609 attaching GSWASIC00026614.
[110] GSWASIC00026609 attaching GSWASIC00026614.
[111] GSWASIC00026609 attaching GSWASIC00026614.
[112] GSWASIC00026581 attaching GSWASIC00026586.
[113] GSWASIC00026586.
[114] GSWASIC00026609.
[115] GSWASIC00026609 at 6610.
[116] T432.3–5 (Day 6).
[117] T432.33–34 (Day 6).

155 Mr Macdonald responded to Ms Mikac stating:

> Yes the term sheet includes that you have the option to renew. It is not automatic and if at the end of the term you are doing 200,000 deliveries per month original price will be honored [*sic*] without any increase. The price we gave you is the best and highest tier which is over 100K deliveries per month.[118]

156 The next day, Ms Mikac responded stating:

> The only issue Martin has is with the 3rd point in the term. The 200k delivery was only an example I gave you. He wants to see what happens if we reach 150k, 200k, 250k etc… within the 36 month contract as well as thereafter.[119]

157 This figure is not insignificant. Deliveries of 120,000 per month correspond to deliveries of 1.44 million per year or 4.32 million over three years. Deliveries of 200,000 per month correspond to 2.4 million per year or 7.2 million over a three-year period. Assuming linear growth from 120,000 per month to 200,000 per month over the course of a three-year contract would yield slightly under 6 million deliveries.[120]

158 In cross-examination, Mr Halphen described the "200k deliveries" as a "hurdle amount",[121] and stated, on multiple occasions, that it was a number he hoped Fruit Box would achieve.[122] However, he denied that the figure of 200,000 deliveries per month was a growth forecast, and stated that it was a figure selected by Ms Mikac in order to discuss, during the negotiations, the issue of whether Fruit Box could pay less per delivery if they did increase the number of the deliveries over time.[123] He also denied telling Mr Macdonald and Mr Hunter in a meeting that Fruit Box would increase their deliveries by 66% in three years;[124] that Fruit Box was not growing at a rate of 20% per annum in 2017;[125] and (as noted above) denied that he told Mr Hunter or Mr Macdonald in a meeting held in February 2017 that it was possible for Fruit Box's rate of deliveries to grow well in excess of 20% per annum using the GetSwift Platform.[126]

[118] GSWASIC00026198 at 6201.
[119] GSWASIC00026198 at 6200.
[120] HCS at [68].
[121] T432 (Day 6).
[122] T432.30–31 (Day 6); T432.43–45 (Day 6); T433.23–24 (Day 6); T433.32–35 (Day 6).
[123] T432.15–30 (Day 6).
[124] T434.10–18 (Day 6).
[125] T435.19–20 (Day 6).
[126] T435.22–25 (Day 6).

159 Similarly, in cross-examination Ms Mikac stated that when negotiating the Fruit Box agreement, she discussed with Mr Macdonald the number of deliveries that Fruit Box made each year but (as also noted above) she had no recollection of any discussion with Mr Macdonald about Fruit Box's growth rate.[127] Ms Mikac did not have knowledge of Fruit Box's internal historic or projected growth numbers, and did not provide any historic or projected growth numbers to GetSwift.[128] I should note here that later (in March 2017), GetSwift's 'Profit & Loss and Metrics' spreadsheet was updated to include Fruit Box in the "onboarding tab".[129] The spreadsheet showed expected revenue to be 120,000 deliveries per month (which would amount to 1,440,000 deliveries per year).

160 On 20 February 2017, Mr Macdonald sent Mr Hunter a copy of the draft Fruit Box agreement for a "[f]inal look over" shortly before its execution.[130] Then, at 4:03pm, Mr Macdonald sent Ms Mikac a signed counterpart of the draft Fruit Box agreement.[131] On 21 February 2017, Mr Halphen signed the draft Fruit Box agreement: a one page document entitled "term sheet" (**Fruit Box Agreement**).[132] The parties thereby entered into an agreement, by which Fruit Box agreed, among other things, to use GetSwift's services for an initial trial period (referred to as a "limited roll out"), expiring on 1 April 2017. Following the "limited roll out" period, an "Initial Term" of 36 months would commence unless Fruit Box gave notice, at least seven days prior to the expiration of the "limited roll out" period that it did not wish to continue the agreement.[133]

The Fruit Box Announcement

161 At 5:19pm on 20 February 2017, Mr Hunter sent an email to Mr Macdonald in which he stated that they should "sort out box contract today if possible and I will finish the announcement".[134] At 7:16pm, Mr Hunter sent Mr Macdonald a revised draft of the Fruit Box announcement.[135]

[127] T441.7–18 (Day 7).
[128] Mikac Affidavit (GSW.0009.0041.0001_R) at [30], and [36(c)].
[129] GSWASIC00027980 attaching GSWASIC00059592 (See GSWASIC00032343 for a PDF version).
[130] GSWASIC00026221 attaching GSWASIC00026207.
[131] GSWASIC00026198 attaching GSWASIC00026207.
[132] Fruit Box Agreement (GSWASIC00025751).
[133] GSWASIC00025748; Fruit Box Agreement (GSWASIC00025751); Agreed Background Facts (GSW.0002.0002.0001) at [19].
[134] GSWASIC00026443.
[135] GSWASIC00026426 attaching GSWASIC00026427.

This draft did not refer to a limited roll out period or trial period, nor did it refer to the agreement (as yet unexecuted) being terminable within such a trial period. However, the draft attached to Mr Hunter's email differed substantially from the draft attached to Mr Mison's email of 16 February 2017, in that it included a projection of deliveries and reference to "significant growth projections" on the part of Fruit Box. On the evidence, it is the only draft of the Fruit Box announcement prepared by Mr Hunter.

162 On 22 February 2017, Mr Macdonald sent an email to Ms Mikac stating that: "Now, as part of regulatory company compliance, the ASX requires us to submit a few dot points about any material term sheets that we GetSwift enters into."[136] Ms Mikac forwarded Mr Macdonald's email to Mr Halphen and stated: "[w]e'll chat tomorrow about it in more detail of how you want to handle it".[137] Mr Halphen replied: "No material contract until we confirm to go ahead after trial. Premature discussion until then. You can pass that on and if a problem, happy to discuss with Joel directly".[138]

163 Ms Mikac subsequently responded to Mr Macdonald's email, stating: "Happy to discuss the Marketing and PR that will benefit both businesses…after a successful trial ☺".[139]

164 On 23 February 2017, Mr Macdonald sent an email to Mr Hunter and Mr Mison attaching the draft Fruit Box announcement, stating: "Please find attached announcement to go out first thing with market opening tomorrow 24th Feb".[140] Relevantly, this revised draft contained numerous amendments, of which was the statement that the Fruit Box Agreement was an "[e]xclusive contract projected at more than 7,000,000+ total aggregate deliveries".[141] Mr Mison confirmed he would send the proposed Fruit Box announcement to ASX for release the following day.[142] Mr Hunter responded, demanding: "Make sure it's marked as earnings/commercially pertinent (red !)".[143]

[136] GSWASIC00025707.
[137] FB.SUB.0001.
[138] FB.SUB.0001.
[139] GSWASIC00025707.
[140] GSWASIC00025702 attaching GSWASIC00025703.
[141] GSWASIC00025703.
[142] GSWASIC00025694.
[143] GSWASIC00025694.

165 Mr Mison then forwarded the draft Fruit Box announcement to Ms Gordon and Mr Eagle for their comment (Mr Macdonald and Mr Hunter were not included in this email).[144] At 8:32pm, Mr Eagle responded to Mr Mison's email with the following comments:

> All, generally reads ok. Bit confusing saying its 7mill+ deliveries for the 3 year contract an then saying 1.5m deliveries a year. Can we fix the maths.
>
> Also 'a exclusive 3 year contract' should be 'an exclusive'.[145]

166 Notably, this is the first evidence of any involvement of Mr Eagle with Fruit Box.

167 Subsequently, Mr Macdonald sent an email to Mr Mison (copied to Mr Hunter) directing Mr Mison to release the Fruit Box announcement to the ASX the following day.[146]

168 In the early hours of 24 February 2017, Mr Mison responded to Mr Eagle's proposed amendments to the draft Fruit Box announcement, stating:

> Thanks Brett, will change the 'an'.
>
> In regards with the delivers, the 1.5m is what is being delivered [now], but the projection is to increase to over 7m. Thi sis [*sic*] showing the potential growth.[147]

169 Mr Macdonald also sent an email to Mr Mison and Mr Hunter at 5:50am stating: "Obviously need to tag as price sensitive as well".[148]

170 On 24 February 2017, GetSwift submitted, and the ASX released, an announcement concerning the Fruit Box Agreement entitled "GetSwift signs The Fruit Box Group (Box Corporate) to a 3 year, 7M+ deliveries contract" (**Fruit Box Announcement**).[149] The announcement was only GetSwift's second announcement specifically concerning agreements it had executed since listing (the first concerned GetSwift "partnering" with Little Caesar's launch of pizza delivery services in Australia). The ASX released the announcement as "price sensitive" on the same day.[150]

[144] GSWASIC00030484 attaching GSWASIC00030485.
[145] GSWASIC00032186.
[146] GSWASIC00025702.
[147] GSWASIC00032186.
[148] GSWASIC00025688.
[149] Fruit Box Announcement (GSW.1001.0001.0397).
[150] Agreed Background Facts (GSW.0002.0002.0001) at [20].

171 At 9:33am on 24 February 2017, Mr Mison forwarded confirmation of the ASX release to Mr Hunter, Mr Macdonald, Mr Eagle and Ms Gordon.[151]

172 Between 24 February and 28 February 2017, Mr Halphen and Ms Mikac became aware of the Fruit Box Announcement. After speaking with Mr Halphen, Ms Mikac sent Mr Macdonald an email on 28 February 2017 stating:

> Can you please explain the public announcement after giving cler [*sic*]instructions from Martin and myself that this was not to take plae [*sic*] until trial successful?[152]

173 On 28 February 2017, Mr Macdonald responded (copied to Mr Hunter), stating:

> Sorry if there was any confusion. As per my email last wek [*sic*], this is not marketing or PR, it is a regulatory requirement as GetSwift being a publicly listed company and the requirement to release any material documents that are signed. We had to comply with this. We will of course coordinate and sponsor any marketing or PR push with you. We are fully committed to make you and your company a huge success.[153]

174 Later that day, Ms Mikac forwarded Mr Macdonald's response to Mr Halphen.[154] Mr Halphen was upset by the fact that GetSwift had made the Fruit Box Announcement and conveyed his concerns to Mr Macdonald in a discussion on or about 28 February 2017.[155]

175 At 5:39pm on 28 February 2017, notwithstanding his dissatisfaction with the Fruit Box Announcement, Mr Halphen instructed Ms Mikac to "[p]lease proceed to trial as planned. I will further discuss this with you on my return and once we see how the trial is going".[156] Ms Mikac responded to Mr Macdonald's email stating, "[w]e shall see how we all go with a trial period!"[157] A reply was sent (copied to Mr Halphen and Mr Hunter): "Of course! We are aiming for Monday 6th March to start with the 10 drivers?"[158]

[151] GSWASIC00052951 attaching GSWASIC00031271.
[152] Mikac Affidavit (GSW.0009.0041.0001_R) at [37]; GSWASIC00025458 at 5459.
[153] FB.SUB.0005.
[154] FB.SUB.0005.
[155] Halphen Affidavit (GSW.0009.0030.0001_R) at [25].
[156] FB.SUB.0005.
[157] GSWASIC00025458 at 5458.
[158] GSWASIC00025458 at 5458.

Fruit Box's' Trial of the GetSwift Platform

176 In around late-February 2017, Fruit Box trialled the GetSwift Platform for its deliveries.[159] Ms Mikac and Ms Dooley were responsible for setting up the trial of the GetSwift software.[160]

177 During March 2017, the limited trial runs were not reaching Fruit Box's expectations. In mid-March, Fruit Box was conducting trial runs in Victoria and South Australia during which a number of bungles occurred, including: the proof of delivery setting was difficult to use;[161] errors occurred when drivers uploaded files;[162] problems occurred with sending the files to Ms Gordon;[163] a Victorian driver was not able to go online;[164] a South Australian driver had a problem with the details displayed in the archived orders folder;[165] the manifest appeared in alphabetical order instead of the correct sequence which was described as a "major issue" by Ms Mikac;[166] and some drivers had difficulty logging on or were unable to go online at all.[167]

178 Ms Mikac explained that in mid-March 2017, Fruit Box still had ongoing issues when using the GetSwift Platform,[168] and these "consistent issues with the platform" made her "hesitant" with "what [GetSwift] could deliver" and she was "starting to have [her] doubts".[169] Ms Mikac stated: "there were consistent issues every single day with the platform" and "it wasn't a smooth run at all",[170] the GetSwift application did not work properly, and there were technical issues that continued throughout late February and mid-March.[171]

179 Ms Dooley noted that the kinds of issues that arose during the trials in March 2017 were not issues that she would have expected in a logistics platform; for instance, she would not have expected there to be an issue with the manifests being in alphabetical order as opposed to in

[159] Mikac Affidavit (GSW.0009.0041.0001_R) at [39]; Dooley Affidavit (GSW.0009.0016.0001_R) at [17].
[160] Mikac Affidavit (GSW.0009.0041.0001_R) at [32].
[161] GSWASIC00024668 at 4668.
[162] GSW.0015.0001.0804 at 0805.
[163] GSW.0015.0001.0804 at 0805.
[164] GSW.0015.0001.0804 at 0804.
[165] GSWASIC00024354.
[166] GSWASIC00024668.
[167] GSWASIC00024469.
[168] T445.15–18 (Day 7).
[169] T445.33–50 (Day 7).
[170] T449.10–11 (Day 7).
[171] Mikac Affidavit (GSW.0009.0041.0001_R) at [33].

the sequence of delivery.[172] Ms Dooley did not recall any successful use of the GetSwift platform during the trials in March 2017: "There were always slight hiccups somewhere".[173] She also stated that the GetSwift Platform required further modifications before it could be used by Fruit Box outside a trial and she did not know whether further modifications could be addressed by GetSwift, but she assumed they could have been.[174] Although Ms Dooley expected "teething issues"[175] and to some extent accepted that GetSwift were assisting in resolving issues as they arose,[176] she formed the view during the trial that the GetSwift Platform was not ready to be used by Fruit Box and required significant further modifications. She reported these concerns to Ms Mikac.[177] It should be noted that there was a successful completion of runs of the GetSwift Platform on 20 March 2017,[178] and Ms Mikac reported to Mr Halphen that it was worthwhile continuing with the process of trial runs of the GetSwift platform; although she "was starting to have [her] doubts".[179]

Ms Gordon's involvement in the Fruit Box trial

180 It is necessary to say something about Ms Gordon involvement in the Fruit Box Trial. Ms Gordon only worked for Fruit Box after the Fruit Box Announcement was released.[180] The work she undertook involved ensuring the .csv files were uploaded correctly from Oracle database (which was the database that Fruit Box were using) so the files could be used on the GetSwift Platform.[181] In mid-March, each day she received a .csv file at around 4pm which included information about all Fruit Box drivers and deliveries for the following day and she then put that .csv file into the GetSwift Platform and it pushed the information to the drivers' mobile telephone at 4pm the following day.[182] For context, "csv" stands for "comma-separated values". Apparently, a .csv file is a text file that uses a comma to separate values within it and

[172] T454.6–12 (Day 7).
[173] T455.39 (Day 7).
[174] T455.30–47 (Day 7).
[175] Dooley Affidavit (GSW.0009.0016.0001_R) at [22].
[176] T445.29–31 (Day 7).
[177] Dooley Affidavit (GSW.0009.0016.0001_R) at [22]–[23].
[178] GSW.0015.0001.0804; T375.5–7 (Day 6).
[179] T445.45–446.6 (Day 6).
[180] T366.15–367.8 (Day 6).
[181] T366.15–367.8 (Day 6).
[182] Gordon Affidavit (GSW.0009.0021.0001_R) at [76].

is commonly produced when data from a database is exported in order to be shared with another user.

181 Ms Gordon understood that if and when the "proof of concept" stage was successfully completed with Fruit Box, she would no longer be involved in the day-to-day process and Fruit Box would use the GetSwift Platform independently. However, the "proof of concept" stage was never completed.[183]

182 The purpose of the tests in March 2017 was to ensure that the GetSwift Platform suited Fruit Box's needs and, if so, whether further improvements were required.[184] Ms Gordon explained that some clients decide the gap is "too huge and they leave, for whatever the reason".[185] Ms Gordon was involved in assisting Fruit Box conduct test delivery runs (that is, facilitating personnel sitting in an office with the client and simulating the client's data); however, she did not do a "live run", meaning that she had not climbed into the truck with the driver and drove with them.[186]

183 Ms Gordon did not accept that a lot of work had been done by GetSwift to customise its platform for Fruit Box.[187] Ms Gordon accepted work on the solution for Fruit Box had begun in November 2016, but noted that only one developer, Mr Urquhart, was working on a solution for Fruit Box and he had many customers to work on so he had limited time.[188] Ms Gordon understood that Fruit Box was operating in a manner similar to any customer whereby Ms Mikac, as an IT Manager, was testing the platform before making it generally available to others to ensure that it was right for Fruit Box.[189]

[183] Gordon Affidavit (GSW.0009.0021.0001_R) at [76].
[184] T366.41–43 (Day 6).
[185] T366.45–367.2 (Day 6).
[186] T367.4–8 (Day 6); T367.29–33 (Day 6); T369.26–28 (Day 6).
[187] T375.38–41 (Day 6).
[188] T376.21–22 (Day 6).
[189] T376.38–43 (Day 6).

Termination of the Fruit Box Agreement

184 On 17 March 2017, Mr Halphen sent an email to Mr Macdonald with the subject line "The Fruit Box Group & Get Swift: Misleading Public Announcement & Promotion".[190] In that email, Mr Halphen stated:

> Unfortunately I am not contacting you under good circumstances. I am extremely upset with the way Get Swift have conducted themselves using our business brand for its own benefit. The areas that make this so incitable is firstly I made it clear in our meeting that nothing was to take place until we had a successful trial. Yes you said that you were following ASX protocol to justify investment made in our potential business but at the very least, courtesy and proactive communication in the form of consent should have been made given our position (but instead it felt that it was pretty underhanded). Second, your announcement states a 3 year deal and not qualifying that there is a conditional trial taking place.
>
> We are now fielding approaches of people asking us for references and I have personally had 5 different conversations about our involvement with Get Swift. Essentially we have been misrepresented in the marketplace. We have spent years in this business trying to build a brand that we are proud of. In your self-serving interests (and please do not insult us any further and pass it off as ours), you have trivialized our position. Reputation is everything to me Joel, so please take this email very seriously and come back with a considered (and prompt) response of how you are going to turn this around.[191]

185 In a subsequent email on 19 March 2017, Mr Halphen wrote to Mr Macdonald:

> Joel. Further to our conversation just before, I confirm our instruction for your WRITTEN response by 5pm March 21st (Eastern Standard Time). Should we not receive it or should your response not be satisfactory, our trial with Get Swift will be immediately cancelled and we will be briefing our solicitors of how we can correct our standing in the marketplace promptly.[192]

186 In his response on the same day, Mr Macdonald stated the following:

> 1. We did in fact inform your staff and company that we would be required to make an ASX announcement. Not only did we do it verbally we also did it in writing. So we DID disclose it that this would be part of the process. We did not get anything from your company saying this would be a problem. Again our apologies for any gaps in understanding. We actually had people ask for comments/PR and we turned them down as per our agreement. Please see enclosed email dated February 22nd (NYC time)
>
> …
>
> 2. We did NOT indulge in any PR, marketing or publicity - we filed one ASX announcement as required and that was it. We categorically deny any

[190] GSWASIC00030369; Halphen Affidavit (GSW.0009.0030.0001_R) at [27].
[191] GSWASIC00030369 at 0373.
[192] GSWASIC00030369 at 0372.

misrepresentation.

3. All we did was state the material facts as required and as we understood them to the best of our knowledge and interpretation.

Therefore with all due respect I am not sure where you are getting the information that we have or are misrepresenting something. Some of the facts you have are not being relayed to properly.

Furthermore I have to wonder just who is responsible for feeding you this information and what their intent is. This may very well be doing harm to our company as a result and just like you are concerned and want to take action, so do we and will if need be.

One thing that you are seriously wrong is thinking there are any underhanded or ulterior motives, if anything we should both be asking why allow anything to create a negative position for both our companies? If you are getting any queries, well please refer them back to us, we will deal with them if you prefer - anything to make it easier on you.

Look we have to date, are and will invest a significant amount of capital to make this software solution work for you. We have not charged you a single dollar for the work we have done - and that is not something anybody does unless they are fully committed to make this work long term. I think that by itself is proof that we value you and wish you to think the same of us.

I hope we can move forward in the right direction. And when it comes to actual marketing or PR, I am more than willing to make it work the way you envision it needs to work and only with your pre approval in writing. If you would like to be included in a national campaign outreach we can do that. If you would like us to highlight you to any large corporates we do business with, we can do that. Bottom line you are a valuable client to us and we don't want you to think any differently.[193]

187 On 20 March 2017, Mr Halphen responded as follows:

> Joel. You still need to address your misleading statement and how you are going to rectify it. No contract for 3 years has been entered into as it is conditional on a trial. That is a material omission. Also, please provide proof and details of exactly what the ASX requires in terms of compliance.[194]

188 Mr Macdonald forwarded the email chain to Mr Eagle.[195] Mr Macdonald also forwarded the Fruit Box Agreement to Mr Eagle.[196] On the evidence, this appears to be the first time Mr Eagle was provided with a copy of the Fruit Box Agreement.

[193] GSW.0032.0001.0001.
[194] GSW.0032.0001.0001.
[195] GSWASIC00053116_R.
[196] GSWASIC00058250 attaching Fruit Box Agreement (GSWASIC00025751).

189 On the same date, Mr Halphen sent an email to the leadership team of Fruit Box informing them that GetSwift had released an announcement to the ASX despite the fact Fruit Box were "in trial only with them" and stated:

> This release was made to the market 24/2. The share price went up 25 percent as a result (from 40 to 50 cents) which can be directly attributed to the release. As from March 1, the share price has continued its momentum {from 50 to 60 cents) without any announcements other than quarterly results. Directly or indirectly, this is somewhere between $10 to $20 million.
>
> The good news is that we must have a strong brand among the public which Get Swift have ridden to coat tails on.
>
> However, the bad news is that we are indirectly involved with misleading behaviour. Whilst there is a deadline of 5pm for GetSwift to respond tomorrow, there is no way we will be continuing with them. The best they can do is to make an altering public announcement and if they do, we will refrain from legal action.[197]

190 Ms Mikac responded to Mr Halphen's email and asked "shall I formally send an email that the trial was unsuccessful or shall I wait till end of tomorrow",[198] to which Mr Halphen responded "Leave it with me."[199]

191 On 20 March 2017, Fruit Box terminated the Fruit Box Agreement, by email, before the expiry of the trial period under the Fruit Box Agreement.[200] In the email from Mr Halphen to Mr Macdonald, Mr Halphen stated: "… this email is notice that we are terminating the agreement and will not be continuing the agreement for the Initial Term at the end of the limited roll out/trial period".[201]

192 On 22 March 2017, Ms Mikac sent an email to Ms Gordon, stating: "Can the ASX announcement please be removed off the GetSwift website, as the contract is now Null and Void".[202]

[197] FB.SUB.0007.
[198] FB.SUB.0008.
[199] FB.SUB.0008.
[200] Halphen Affidavit (GSW.0009.0030.0001_R) at [31]; GSW.0032.0001.0007; Agreed Background Facts (GSW.0002.0002.0001) at [23].
[201] GSW.0032.0001.0007.
[202] GSWASIC00024089.

Conversation between Ms Gordon and Ms Mikac on 22 March 2017

193 On 22 March 2017, Ms Gordon telephoned Ms Mikac to enquire why she had not received the usual file from Fruit Box at 4pm that day.[203] Ms Mikac informed her that Fruit Box had cancelled the contract,[204] Mr Halphen had made up his mind and the contract would not be reinstated,[205] GetSwift announcement had caused problems with Fruit Box's drivers and their supervisors,[206] and Mr Halphen had wanted the opportunity to see if the proof of concept worked before speaking to their delivery drivers about the GetSwift Platform.[207] Ms Gordon asked Ms Mikac if the relationship between Fruit Box and GetSwift could be salvaged and Ms Mikac said words to the effect "It's too late. The damage is done".[208]

194 Ms Mikac could not recall precisely the date that she had the conversation with Ms Gordon, but agreed that she had a conversation with Ms Gordon in which she had said that Mr Halphen had decided to terminate the GetSwift contract,[209] and that "they would no longer be pursuing with GetSwift".[210] Ms Gordon asked if they could work it out and Ms Mikac told her "no".[211] Ms Mikac stated that Mr Halphen was adamant that he would not continue with the agreement with GetSwift by late March,[212] and that the only time she spoke to Mr Macdonald about terminating the contract was at the time the Fruit Box Announcement was made.[213]

GetSwift Board Meeting on 27 March 2017

195 On 27 March 2017, a GetSwift board meeting was held. Ms Gordon gave a detailed account of what was said at the meeting in the course of her oral evidence in chief. Ms Gordon recalls that she was asked by Mr Macdonald to "please tell the directors what you told me regarding Fruit

[203] T248.16–23 (Day 4).
[204] T248.28–31 Day 4).
[205] T375.13–26 (Day 6).
[206] T375.29–36 (Day 6).
[207] T377.20–25 (Day 6).
[208] T377.27–44 (Day 6); T378.12–14 (Day 6).
[209] T446.23–29 (Day 7).
[210] T446.40–43 (Day 7).
[211] T447.1–16 (Day 7); T448.19–23 (Day 7).
[212] T448.1–8 (Day 7).
[213] T449.13–21 (Day 7).

Box and the conversation you had with Ms Mikac".[214] Ms Gordon responded that she had had a conversation with Ms Mikac in which Ms Mikac had said words to the effect:

> The contract is cancelled because the business didn't want the contract to be announced to the ASX, and that the … users were getting calls from competitors' users [*sic*] asking them questions, "how is the system going", when, in fact, they haven't even seen the system yet. … she also said that "we requested retraction but nothing happened".[215]

196 Ms Gordon recalled that Mr Hunter had then said to Ms Gordon: "[t]his is madness. It's small people mentality … Why are they talking to you, Jamila? You are not commercial. They are probably angling for more discount".[216] Ms Gordon, with commendable restraint, responded to this rudeness by saying that she thought that GetSwift should retract the announcement and Mr Hunter said: "Okay. We will retract it. I own the retraction, but we all agree the message is we're retracting this contract is cancelled because they didn't want us to announce it to the ASX".[217] Ms Gordon recalled that everyone present at the board meeting, including Mr Macdonald, Mr Eagle and Ms Gordon, agreed with Mr Hunter, in words to the effect of "Yes that's the right message".[218] Mr Hunter then said words to the effect of "I will draft the announcement and circulate it and then I will send it. But before I send it, Joel can you contact them for last chance. … If they still say no, I will send the announcement to the ASX."[219]

197 In cross-examination, Ms Gordon clarified that when she said "retract", she meant "to tell the ASX the contract had been cancelled".[220] Ms Gordon was tested closely as to whether Ms Mikac did indeed tell her that the contract was cancelled, to which Ms Gordon responded, in my view compellingly, "Ms Mikac was very clear, very, very clear, crystal clear that the contract has gone, too late".[221]

[214] T249.39–250.6 (Day 4).
[215] T249.39–250.6 (Day 4).
[216] T250.10–14 (Day 4).
[217] T250.27–29 (Day 4).
[218] T250.33–35 (Day 4).
[219] T249.39–41 (Day 4).
[220] T382.4–8 (Day 6); T382.29–34 (Day 6).
[221] T384.9–10 (Day 6).

Draft of Fruit Box termination announcement

198 On 27 March 2017, Mr Hunter sent the board of GetSwift an email attaching a draft ASX announcement entitled "Fruit Box declines to proceed with GetSwift".[222] The draft announcement referred to Fruit Box "decid[ing] to terminate the agreement".[223] This announcement was never submitted to the ASX. In his email, Mr Hunter stated:

> Just in case Box is actually serious about terminating the contract and not trying to get better commercial terms we need to send out the notification to the ASX as part of the continuous disclosure rules. The fact that they keep reaching out to you Jamila makes me wonder what their actual agenda is since its pretty amazing that the only reason they would terminate the contract as per what they said in that we disclosed it to the ASX.
>
> Either way here is the proposed text and we should put out forthright [*sic*] if its confirmed.[224]

199 Although senior counsel for ASIC submitted in his oral opening that "[t]hey never released [the Fruit Box termination announcement]", Ms Gordon assumed that "perhaps they might have, but didn't really know".[225]

End of GetSwift engagement with Fruit Box

200 On 23 March 2017, the Profit & Loss and Metrics spreadsheet still showed Fruit Box as a customer on the "onboarding" tab.[226] The spreadsheet also showed that no deliveries were made in November 2016, only 3 deliveries were made in December 2016, no deliveries were made in January 2017 and 166 deliveries were made during the trial in February 2017. However, the Profit & Loss and Metrics spreadsheet dated 5 April 2017 showed that Fruit Box had been removed as a client of GetSwift on the "onboarding tab".[227]

201 On 7 June 2017, Mr Hunter instructed Ms Hughan to remove the reference to "Fruit Box" as a client of GetSwift in a media release that she was drafting for GetSwift regarding its achievements in its first six months since listing on the ASX.[228]

[222] GSWASIC00032542 attaching GSWASIC00032543.
[223] GSWASIC00032543.
[224] GSWASIC00032542.
[225] T76.5–615 (Day 1).
[226] GSWASIC00064659 attaching GSWASIC00031218.
[227] GSWASIC00046154.
[228] GSWASIC00018618.

202 On 22 January 2018, Ms Stephanie So (of the ASX) sent an email to Mr Eagle and Mr Banson (copied to Mr Andrew Black, Manager of Admissions within ASX Listings Compliance at the ASX) attaching a letter dated 22 January 2018.[229] In that letter, the ASX asked: "Has the contract with The Fruit Box Group been terminated?"[230] A response was sent to the ASX on 24 January 2018, which said "Yes. On or about 20 March 2017, Fruit Box Group sought a release from the contract".[231] The letter made plain that "GetSwift confirms that the GetSwift responses have been authorised and approved for release to ASX by the board of directors of GetSwift".[232] Mr Eagle signed the letter on behalf of GetSwift in his then capacity as General Counsel.

G.1.2 *Commonwealth Bank of Australia*

203 The second of the Enterprise Clients is the Commonwealth Bank of Australia (**CBA**).

The CBA Agreement

204 On 30 March 2017, GetSwift and CBA entered into an agreement described as a "Strategic Partnership Agreement" (**CBA Agreement**).[233] Pursuant to the CBA Agreement, CBA and GetSwift agreed, relevantly, to work in partnership with the aim of providing an application (**GetSwift App**) with which customers would be able to optimise, dispatch, route, and keep track of their deliveries to end customers on any Albert device. Albert devices are portable, iPad-like, payment terminals which CBA issued to its merchant customers for use by them to receive payment for goods and services.[234] Unlike traditional payment terminals where the merchant has a physical PIN pad, an Albert terminal is an interactive touch screen that allows the merchant to be able to use applications on the device similar to a smart phone.[235] During 2017, "CBA merchants" were business customers who had successfully applied to CBA to

[229] GSW.0031.0004.7726.
[230] GSW.1001.0001.0054 at 0063.
[231] GSW.1001.0001.0054 at 0055.
[232] GSW.1001.0001.0054 at 0057.
[233] CBA Agreement (GSWASIC00062596).
[234] Gordon Affidavit (GSW.0009.0021.0001_R) at [90]–[92]; Affidavit of David Budzevski affirmed on 22 October 2019 (**Budzevski Affidavit**) (GSW.0009.0044.0001_R) at [7].
[235] Budzevski Affidavit (GSW.0009.0044.0001_R) at [7].

receive merchant services from the bank. Some CBA merchants, but not all, were provided with one or more Albert terminals.[236]

205 The CBA agreement provided that it would commence on the "Commencement Date" and would "end on the date being the earlier of: (a) the termination by either party in accordance with this Agreement; and (b) two years from the Commencement Date".[237] It also provided, "The Exclusivity Period may be extended for an additional period of 24 months, with the same terms in this clause applying, by the written consent of both parties (which may be by an exchange of emails between suitably authorised representatives)".[238] I will return to the significance of the CBA Agreement, and its development, in the chronology that follows.

The First and Second Meeting: 8 December 2016 and 20 January 2017

206 The first in-person "meet and greet" between GetSwift and CBA was held on 8 December 2016 between Mr Alan Madoc (Director of Telecommunications, Media, Entertainment, Technology and Retail at CBA), Ms Gordon, Mr Hunter and Mr Macdonald.[239] Mr Bruce Begbie (Executive Director of CBA) does not recall whether he attended this meeting.[240] Following the meeting, Mr Madoc emailed Ms Gordon, Mr Hunter and Mr Macdonald (copied to Mr Begbie) noting it was a "Pleasure to meet you today" and seeking to arrange a further meeting to be held at the CBA's Innovation Lab.[241]

207 A second meeting was held between Mr Madoc, Ms Gordon, Mr Hunter and Mr Macdonald on 20 January 2017.[242] It is unclear where this meeting was held, though it was scheduled to be held at the CBA's Innovation Lab. Mr Begbie says that he did not attend this meeting.[243] Mr Edward Chambers, a Senior Manager in CBA's industry marketing team, and Mr David Budzevski, CBA's Senior Product Manager of Smart Terminals and Applications, both depose

[236] Budzevski Affidavit (GSW.0009.0044.0001_R) at [9]; 961.001.000490 attaching 961.001.000491; 961.001.000498 attaching 961.001.000500.
[237] CBA Agreement (GSWASIC00062596) at cl 2.
[238] CBA Agreement (GSWASIC00062596) at cl 6(c).
[239] GSWASIC00028225; Affidavit of Allan Madoc affirmed on 27 September 2019 (**Madoc Affidavit**) (GSW.0009.0008.0001) at [8]–[10]; T400.26–29 (Day 6).
[240] Affidavit of Bruce Geoffrey Begbie sworn on 3 October 2019 (**Begbie Affidavit**) (GSW.0009.0015.0001) at [15].
[241] GSWASIC00028225.
[242] GSWASIC00027711.
[243] Affidavit of Bruce Geoffrey Begbie sworn 3 October 2019 (**Begbie Affidavit**) (GSW.0009.0015.0001) at [16].

that they have never attended the Innovation Lab with any representative of GetSwift.[244] Mr Madoc agreed, in cross-examination, that Mr Budzevski was not at the meeting on 20 January 2017.[245] After that meeting, at 3:47pm, Mr Madoc circulated an email in which he sought to arrange a meeting between GetSwift and Mr Budzevski.[246]

208 During the first two meetings between GetSwift and CBA, it became apparent to Mr Madoc that there was the potential for GetSwift to develop an app that could be used by CBA merchants on its Albert device and he sought to facilitate that occurring.[247]

Non Disclosure Agreement and initial draft terms of the CBA Agreement

209 On 23 January 2017, Mr Madoc sent a non-disclosure agreement (**NDA**) to Mr Hunter (copied to Mr Macdonald and Ms Gordon), which Ms Noot for GetSwift sent back to CBA by email on 24 January 2017 in a form executed by both Mr Hunter and Mr Macdonald.[248] Mr Madoc returned the countersigned version of the NDA by email the same day.[249] Subject to the usual exceptions, the NDA required GetSwift to keep confidential certain information, including the terms of the CBA Agreement (cl 1.1(c)), the fact that the parties were discussing the "Purpose" (which was defined as "Transaction banking/partnership opportunities"), and the substance of those discussions (cl 1.1(b)).

210 On 31 January 2017, Mr Budzevski sent an email to Mr Hunter, Mr Macdonald and Ms Gordon, (copied to Mr Madoc and others), attaching a document containing draft terms entitled "Developer Terms for PI Programme".[250] Clause 14 of those terms provided that GetSwift would collect all payments directly from merchants who used the GetSwift App through the AppBank and further that "CommBank will receive a 15% commission on all monthly merchant fees collected by GetSwift". By this time, it was apparent that the revenue that both GetSwift and CBA would make from the GetSwift App on the Albert device would depend on the

[244] Affidavit of Edward Chambers sworn 4 October 2019 (**Chambers Affidavit**) (GSW.0009.0018.0001_R) at [9]; Budzevski Affidavit (GSW.0009.0044.0001_R) at [29].
[245] T473.14 (Day 7).
[246] GSWASIC00027711.
[247] T464.42–46 (Day 7).
[248] GSWASIC00059367.
[249] GSWASIC00059367 attaching GSWASIC00059373.
[250] GSWASIC00059302 attaching GSWASIC00059305.

number of merchants who used the app,[251] and that it was important for the parties in determining the joint commercial value of the deal to have some understanding of the likely number of transactions that would be put through the joint platform.[252]

211 On 2 February 2017, Mr Hunter sent an email to Ms Gordon, Mr Macdonald and Mr Eagle in relation to the draft terms received from CBA, stating:

> As discussed, here are my points that we should resolve/structure with CBA:
>
> …
>
> 5. Product reach - Australia is a given, let's discuss/agree how we can help CBA reach a broader audience that does business in the 55+ countries we are in if desired. For us a global footprint is part of our strategy.[253]

212 On 4 February 2017, Ms Gordon sent an email to Mr Budzevski (copied to Mr Hunter, Mr Macdonald and Mr Madoc), providing a number of comments in relation the draft terms received.[254] The content of this email is not relevant, although it reveals Mr Hunter's and Mr Macdonald's knowledge and involvement in the negotiation of the key terms of the CBA Agreement. Mr Hunter replied to Ms Gordon's email to Mr Budzevski (copied to Mr Macdonald and Mr Eagle), stating:

> It's not quite what I had in mind when communicating what [our] expectations are. We really need to tighten our travel and expenses, so any preliminary negotiations should be formed to maximise our time in Sydney and achieve results. I will follow up your email to David so we can get some traction.[255]

213 On 4 February 2017, Mr Hunter sent an email to Mr Budzevski, copied to Ms Gordon, Mr Macdonald and Mr Madoc, in which he stated:

> Just to follow up on Jamilas [*sic*] email so that we can achieve some traction when we meet next week. Here are the high level commercial perspectives we have and what we should be working towards:
>
> 1. Structures commercial agreement for partnership between CBA and GetSwift to provide a best in class software logistics platform delivered by GetSwift and incorporate it into the CBA payment solutions and Albert devices to the CBA network

[251] T467.1–11 (Day 7).
[252] T492.42–45 (Day 7).
[253] GSWASIC00066766.
[254] GSWASIC00027291.
[255] GSWASIC00066761.

> of 50,000+ businesses and [GetSwift] network across 55 + countries. …[256]

214 Nobody responded to this email from Mr Hunter. Mr Budzevski accepted in cross-examination that he understood from this email that one of the things Mr Hunter wanted to achieve at the meeting being arranged for 13 February 2017 was to "assign a value to the expected metrics we expect to put through the joint platform".[257]

The Third Meeting: 13 February 2017

215 A further meeting was held on 13 February 2017. Mr Madoc and Mr Chambers each say they attended this meeting.[258] Mr Madoc says Mr Budzevski also attended this meeting,[259] though Mr Budzevski could not recall whether he attended the meeting.[260] Mr Begbie was also present.[261]

216 Immediately following the 13 February 2017 meeting, Mr Hunter sent an email dated 13 February 2017 to Mr Chambers (copied to Mr Macdonald, Ms Gordon, Ms Cox and two representatives of M+C Partners, Mr Polites and Ms Hughan), in which he stated, relevantly:

> It was a pleasure speaking with you all today… I have included our PR/Marketing team in the chain (Harry and Elise) as well as Sue.
>
> We should start drafting the PR /Marketing announcements based on the following high level phased strategy:
>
> 1. Planned in March: Market announcement indicating CBA -GetSwift partnership. Emphasis on market potential, nimble joint team dynamic integration including tech, product, sales and marketing; delivery of product solutions to a [*sic*] **55k+ SME clients**, 57+ countries, 400+ cities etc; timing and methodology to deploying into market starting with select clients, and then making it available to all by X date in 2017 etc.[262]

217 Mr Hunter's 13 February 2017 email is the earliest reference to a figure of "55,000" in the documentary evidence before the Court in this proceeding.

[256] 961.004.000001.
[257] T491.32–35 (Day 7).
[258] Madoc Affidavit (GSW.0009.0008.0001) at [16]; Chambers Affidavit (GSW.0009.0018.0001_R) at [11].
[259] T467.13–18 (Day 7).
[260] T491.1–9 (Day 7).
[261] Begbie Affidavit (GSW.0009.0015.0001) at [18]–[19].
[262] GSW.0019.0001.2081 (emphasis added); GSWASIC00026886.

218 Mr Madoc gave evidence during his private examination required pursuant to s 19 of the *ASIC Act*,[263] and again during cross-examination, that it was his recollection that someone from CBA, possibly Mr Budzevski, had said at one of his initial meetings with GetSwift, likely the meeting on 13 February 2017, that CBA had 55,000 retail merchants.[264] This was consistent with Mr Madoc's recollection that "55,000 retail merchants was the sort of number that had been mentioned in [his] initial discussions with GetSwift".[265] Mr Madoc agreed that, in his private examination, he likely conflated the meetings of 19 January 2017 (this should be 20 January 2017) and 13 February 2017, the latter being the one which Mr Budzevski did attend.[266]

219 Mr Budzevski deposed that the first time he saw the number of 55,000 retail merchants was in the draft media release sent to him by Ms Gordon on 21 February 2017, and that:

> As best as I can recall, I had not told anyone at GetSwift that the CBA had 55,000 retail merchants and I thought (based on my knowledge of the number of CBA merchants and Albert merchants at the time) that the number was incorrect.[267]

220 Mr Budzevski's evidence in this respect was not challenged in cross-examination.

221 Moreover, Mr Madoc stated in his evidence the relevant figures lay within Mr Budzevski's area of expertise and not that of Mr Madoc. He gave evidence in his private examination (in a passage on the same page he was cross-examined about, but to which he was not taken but which was placed in evidence without limitation) in relation to the number of retail merchants and Albert terminals, that "I don't keep track, again, it's not really my area of expertise. And, to be honest, it's not really my interest…"[268] Indeed, he deposed that he recalled there being some discussions about Albert terminals at the 13 February 2017 meeting but he did "not recall any discussion about the number of Albert terminals in circulation, the number of CBA merchants who had an Albert terminal or the volume of transactions involving Albert terminals".[269] Mr Madoc further said:

> I do not recall that we had any discussion about specific numbers (whether number of

[263] Madoc Private Examination Transcript (GSW.0005.0007.0001).
[264] T473.1–32 (Day 7).
[265] T472.29–43 (Day 7).
[266] T473.15–18 (Day 7).
[267] Budzevski Affidavit (GSW.0009.0044.0001_R) at [96].
[268] Madoc Private Examination Transcript (GSW.0005.0007.0001) at 44.10–44.18.
[269] Madoc Affidavit (GSW.0009.0008.0001) at [19].

> deliveries or transaction values). I recall that Mr Budzevski was pretty general in what he spoke about, given the commercial sensitivities (especially around the Albert device).[270]

Drafting of the CBA Announcement and CBA Agreement

222 On 13 February 2017, Ms Elise Hughan (Public Relations Advisor at Media & Capital Partners) replied to the recipients of Mr Hunter's email dated 13 February 2017, stating "Happy to work on both a draft of this announcement as well as have a call to discuss how we can work future news flow together…"[271]At 2:28pm on 14 February 2017, Mr Hunter replied to Ms Hughan, stating "Great email. Why don't you start on the draft anyways [*sic*] and then fling it our way anyways [*sic*]? This way I can start advocating it internally with CBA for their tweaks".[272]

223 On 15 February 2017, Mr Hunter sent an email to Mr Eagle in which he stated, "Can you get back to me re the CBA paperwork? I want to tie them down this week plus there is more from them to come. We plan on announcing March 27th."[273] That afternoon, Ms Hughan replied to Mr Hunter stating that she had not "heard back from the CBA team yet and am cautious about what approach we take to make sure we aren't stepping on any toes." She further noted:

> Rather than draft an announcement, I think it would be more beneficial if we work on some draft points as to what we think should be included on GetSwift's end, as well as some of the wording around specific details. This way we're playing in with our company notes, rather than theirs.
>
> Happy to work on that this week and send through so you guys can have a look.
>
> Then once we've had a call with the CBA team introducing ourselves properly…we can send through those points as suggestions to them.[274]

224 On 19 February 2017, Mr Budzevski sent Ms Gordon a draft of the proposed CBA Agreement.[275]

225 On 21 February 2017, Mr Hunter sent an email to Mr Macdonald and Ms Gordon attaching a draft media release.[276] In this email Mr Hunter stated:

[270] Madoc Affidavit (GSW.0009.0008.0001) at [19].
[271] GSW.0019.0001.2107.
[272] GSW.0019.0001.2107.
[273] GSWASIC00026704.
[274] GSW.0019.0001.2107.
[275] Budzevski Affidavit (GSW.0009.0044.0001_R) at [31]; GSWASIC00026480 attaching GSWASIC00059048.
[276] GSWASIC00059006 attaching GSWASIC00059007.

> Please review and comment. We need to get a highly visible CBA exec to be quoted, but this needs to go out in the press on Monday. We will also be announcing it on the ASX before then.
>
> Jamila after our internal review can you please get Ed and his team to look at and provide their inputs today…[277]

226 The first draft of the media release prepared by Mr Hunter contained the following statements:

> **CBA and GetSwift sign exclusive 5 year partnership agreement**
>
> Highlights
>
> - CBA and GetSwift have signed an [*sic*] game changing exclusive 5 year partnership agreement to deliver GetSwift's last-mile delivery services solution on the CBA Albert device and other platforms to optimise deliveries across Australia.
> - CBA and GetSwift will leverage their joint market reach to provide more than 55,000 existing businesses in their joint networks the capability to seamlessly integrate payments, deliveries and other service needs.
>
> …
>
> - **This market represents more than 257,400,000 deliveries per year with an estimated transaction goods value of more [*sic*] 9 billion dollars with significant growth projections over the next 5 years in place.**[278]

227 When Ms Gordon first saw the 55,000 "existing businesses" figure was when she received the draft media release from Mr Hunter on 21 February 2017; she did not know how this estimate was calculated.[279]

228 At 12:50pm, Mr Hunter sent an email to Mr Macdonald, Ms Gordon and Mr Eagle, attaching a further draft of the proposed media release, in which he stated: "Waiting for CBA input but other than that ready to go. I still want the maximum impact with this release".[280] The reference to maximum impact, I find, was a reference to maximum impact on the price of GetSwift shares. The figures referred to in Mr Hunter's original draft of the media release remained unchanged.

[277] GSWASIC00059006.
[278] GSWASIC00059007 (emphasis altered).
[279] Gordon Affidavit (GSW.0009.0021.0001_R) at [130], and [153].
[280] GSWASIC00059002 attaching GSWASIC00059003.

229 At 1:42pm, Mr Eagle sent an email to Mr Hunter, Mr Macdonald and Ms Gordon attaching a draft of the CBA Agreement and stating: "Please see revisions to the CBA contract for your review and comment. Can we have a quick call today to tie up any further changes?"[281] At 1:44pm, Mr Hunter sent an email to Mr Macdonald, Ms Gordon and Mr Eagle with a subject line "Last version for CBA", in which he stated:

> "Please review and comment. Jamila can you please get the high level exec that can be quoted from CBA for this as well as where they aim to push this and when? We need to lodge this with the ASX just prior to the media push on Monday!
>
> Brett we need those commercial terms.[282]

230 The figures referred to in Mr Hunter's original draft of the media release remained unchanged.

Provision of draft media announcement to CBA and negotiation of the CBA Agreement

231 At 1:48pm on 21 February 2017, Mr Hunter sent an email to Mr Chambers, copied to Mr Macdonald and Ms Gordon, stating: "We are just about ready on our end with the announcement document – I will have Jamila send it out shortly".[283] Simultaneously, Ms Gordon sent an email to Mr Budzevski, copied to Mr Hunter, attaching a draft of the CBA Agreement.[284] At 3:11pm, Ms Gordon sent an email to Mr Budzevski attaching a copy of the draft media release.[285] The figures referred to in Mr Hunter's original draft of the media release remained unchanged. Ms Gordon forwarded this email minutes later to Mr Macdonald and Mr Hunter and stated: "FYI – I just sent the draft doc to David [Budzevski] and Allan [Madoc]. Waiting for their feedback before I share it with Ed [Chambers]".[286]

232 Mr Budzevski accepted that the statement in the final paragraph (as emphasised at [226]) was "one of the matters that was commercially important to the parties, that is, how many transactions might go through the joint platform".[287] Mr Budzevski did not reply to Ms Gordon to inform her that the draft media release was in any respect incorrect.

[281] GSWASIC00067989 attaching GSWASIC00067990.
[282] GSWASIC00068183 attaching GSWASIC00068417; GSWASIC00067986; GSWASIC00067987.
[283] GSWASIC00026304.
[284] GSWASIC00025761.
[285] GSWASIC00026234 attaching GSWASIC00026235.
[286] GSWASIC00067966.
[287] T494.8–35 (Day 7).

233 At 3:58pm, Mr Macdonald sent an email to Mr Eagle, copied to Ms Gordon and Mr Hunter, attaching a Word version of the draft media release.[288] The figures referred to in Mr Hunter's original draft of the media release remained unchanged. At 4:08pm, Mr Macdonald sent an email in reply to Ms Gordon's email, copied to Mr Hunter and Mr Eagle, attaching another draft of the media release.[289] In the email, Mr Macdonald stated: "Whoops that was the wrong one – Please provide this one right away. Just tell them you sent the wrong version".[290] The figures in the revised draft remained unchanged from the version that Mr Hunter had originally circulated. Ms Gordon does not appear to have forwarded the further version of the draft media release received from Mr Macdonald to CBA.

234 At 5:37pm, Mr Hunter sent an email to Mr Edward, copied to Mr Macdonald, Ms Gordon, Mr Polites, Ms Hughan and others at CBA, stating: "Hi team, We should have the first version circulating for you tomorrow".[291] It appears that Mr Hunter was unaware that Ms Gordon had already sent the draft media release to Mr Budzevski earlier that day. At 10:18pm, Mr Budzevski forwarded the draft media release he had received from Ms Gordon to Mr Chambers and others internally at CBA.[292]

Initial CBA response to the draft media release

235 At 8:23am on 22 February 2017, Mr Chambers replied to Mr Budzevski's latest email, attaching an amended draft media release and stated "My comments attached".[293] He amended the wording slightly, such that it said "With their combined networks, CBA and GetSwift will be able to provide more than 55,000 existing businesses the capability…". He did not indicate that he thought that the figure of 55,000 was incorrect.[294]

236 At 9:28am, Mr Hunter sent an unfortunately worded email to Ms Gordon with subject line "Re Draft CBA/GetSwift PR" stating:

> I always believe that fate [*sic*] accompli solves many "hurdles". … If the wording gets

[288] GSWASIC00067972 attaching GSWASIC00067974.
[289] GSWASIC00067966 attaching GSWASIC00067968.
[290] GSWASIC00067966.
[291] GSWASIC00025815.
[292] 961.004.000122 attaching 961.004.000123.
[293] 961.001.000206 attaching 961.001.000208.
[294] T495.9–496.6 (Day 7).

> changed or diluted (especially when we had Ed agree to rubber stamp it -check his email if you don't believe me) then **this will be a failure and will directly impact not only our share price , but our capital raise .** And that's why I am not pleased.[295]

237 At 9:45am, following a request by Mr Hunter, Mr Macdonald forwarded an email to Ms Hughan, copied to Mr Polites, attaching a copy of the draft media release which Mr Hunter had drafted and circulated the previous day.[296] The figures referred to in Mr Hunter's original draft of the media release remained unchanged. At 9:49am, Mr Eagle sent an email to Mr Hunter and Mr Macdonald, providing comments on the draft media release.[297]

238 At 10:26am, Mr Polites sent an email to Mr Hunter and Mr Macdonald in which he noted:

> There's actually another major announcement coming out from CBA next week.
>
> They were worried about rushing this press push because you needed to disclose this on the ASX. I suspect this isn't the case, and it's a bit of confusion from the email chain.
>
> If we can sit on this for a fortnight or three weeks, it will get a better result and give us time to finesse the media…[298]

239 At 10:54am, Mr Hunter replied to Mr Eagle's comments on the draft media release in a way that reflected his apparent preoccupation:

> Ps look at our stock price right now and tell me my strategy is wrong. We are almost at 50c. That's an outperform [*sic*] of anything on the exchange.[299]

240 One minute later, Mr Hunter sent another email to Mr Eagle in which he stated: "You just made 130% returns in 3 months on our shares".[300]

241 At 11:01am, Mr Jason Armstrong (Public Affairs and Communications Adviser at CBA) sent an email to Mr Polites, stating: "I'm looking at the media release and will come back shortly".[301] At 12:23pm, Mr Budzevski sent an email internally to Mr Jason Armstrong of CBA and others, in which he stated:

> GetSwift are pushing to get an ASX announcement out next week which I am not

[295] GSWASIC00025854 (emphasis added).
[296] GSWASIC00025815 attaching GSWASIC00025825.
[297] GSWASIC00067945_R.
[298] GSW.0019.0001.2655.
[299] GSWASIC00067945_R.
[300] GSWASIC00067944.
[301] GSW.0027.0001.5436.

> supportive of …
>
> I agree we need to hold any announcement until we go through our internal process and agree on the executive sponsor.
>
> Also note that GetSwift are an emerging tech provider and any announcement will likely have a positive impact on their stock position.[302]

242 In cross-examination, Mr Budzevski agreed that the relevant executive sponsor was Kelly Bayer Rosmarin and that the idea was that, before any announcement to the ASX went out, he wanted the executive sponsor to have an opportunity to approve the announcement.[303]

Draft of the media release prepared by Mr Polites

243 At 8:35am on Friday, 24 February 2017, Mr Polites sent an email to Mr Hunter and Mr Macdonald, stating:

> Hi guys,
>
> FYI.
>
> Core goal here: We want CBA to use all that juicy data about the effectiveness of your delivery system as if they reaffirm it, it becomes more of a fact.
>
> I also want them to fill in the blank regarding exact use case.
>
> I've used your quotes from the ASX release Bane, however depending on the tone of the release they may ask for them to be changed.
>
> Ping me back any feedback ASAP. This is just a first draft.[304]

244 The text of his draft media release appeared in the body of Mr Polites' email and referred to 55,000 "merchants" (instead of "existing businesses"), and that "GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform over the next five years, with an estimated transaction value of $9 billion".[305] The reference to GetSwift estimating the projections was a new addition introduced into the draft media release by Mr Polites, and one which neither Mr Hunter, Mr Macdonald, Mr Eagle nor Ms Gordon sought to alter subsequently.

[302] 961.002.000082.
[303] T496.17–32 (Day 7).
[304] GSW.0019.0001.2784 at 2785; See also GSW.0019.0001.2769.
[305] GSW.0019.0001.2784 at 2785.

245 At 8:56am, Mr Macdonald replied to Mr Polites' email, stating: "Couple of suggestions on my end" and marked his amendments to the draft media release in red font in the body of the email.[306] Mr Macdonald's amendments did not concern the 55,000 merchants, 257,400,000 deliveries or the $9 billion transaction value. At 9:44am, Mr Hunter replied to Mr Polites' email explaining:

> … the estimated transaction volume is per year when fully spun up not across 5 years! It's 55,000 merchants doing and average of 4680 deliveries per year which is conservative. We have individual clients we just signed up for example that do more than 100k per month.[307]

246 At 10:01am, Mr Polites replied to Mr Hunter, noting:

> Fair enough -- but for the sake of not confusing press we should stick to figures and only publish one set of them. Even if they are conservative, they still sound really good!
>
> So: GetSwift estimates the deal will result in over [257,400,000] deliveries on its platform over the next five years, with an estimated transaction value of $9 billion per year.
>
> How's that?[308]

247 When asked in cross-examination about the use of the phrase "their figures", Mr Polites initially said that "I can't recall in this period of time whether my understanding of whose figures belong to who was clear", though Mr Polites later agreed that at the time of the email he was referring to information from CBA.[309]

248 At 10:29am, Mr Hunter replied to Mr Polites email, stating:

> Err I think there is a miscommunication here: it's big [*sic*] difference - it's per year so it's more than a billion deliveries aggregate for 5 years.
>
> So: GetSwift estimates the deal will result in over [257,400,000] deliveries on its platform per year once fully spun up, with an estimated transaction value of $9 billion per annum.[310]

[306] GSW.0019.0001.2784 at 2784–2785.
[307] GSW.0019.0001.2784; See also GSW.0019.0001.2769.
[308] GSW.0019.0001.2784.
[309] T562.20–33 (Day 8).
[310] GSW.0019.0001.2784.

249 At 12:05pm, Mr Polites sent an email to Mr Armstrong, attaching a draft media release and stating:

> As promised, here's a rough draft from our end to help expedite things.
>
> We've given it a basic framework, and added in quotes and relevant info. It's a strawman at best, but it should help regardless.[311]

250 The draft media release from Mr Polites referred to 55,000 merchants, and stated that "GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform over the next 5 years, with an estimated transaction value of $9 billion per year."[312]

251 Notably, Mr Polites deposed that the 55,000 merchants figure was GetSwift's own estimate based on its data.[313]

CBA handover from Mr Armstrong to Ms Kitchen

252 On 27 February 2017, Mr Armstrong sent an email to Ms Natalie Kitchen, who was a senior communications consultant at CBA at the time, to "handover" the PR work for the GetSwift project effectively to Ms Kitchen.[314] As part of this handover, Mr Armstrong forwarded two emails to Ms Kitchen.[315] The *first* being the email from Mr Chambers to Mr Budzevski dated 22 February 2017, attaching the document entitled "media release"[316] and the draft media release referring to 55,000 *existing businesses*, which stated that "[t]he market represents 257,400,000 deliveries per year with an estimated transactional goods value of more than AU $9 billion along with significant growth projected over the next 5 years".[317] The *second* being the email from Mr Polites to Mr Armstrong dated 24 February 2017 with the subject line "Draft GetSwift media release" attaching a different version of the draft media release.[318] The second draft media release referred to 55,000 *merchants*, and that "GetSwift estimates the deal will

[311] 961.001.000203 attaching 961.001.000204.
[312] 961.001.000204.
[313] Polites Affidavit (GSW.0009.0019.0001_R) at [52].
[314] T531.16–46 (Day 8); Affidavit of Natalie Rochfort Kitchen affirmed 9 October 2019 (**Kitchen Affidavit**) (GSW.0009.0043.0001_R) at [3], and [7].
[315] 961.001.000197 attaching 961.001.000203, and 961.001.000206; T532.1–8 (Day 8).
[316] 961.001.000206 attaching 961.001.000208.
[317] 961.001.000208.
[318] 961.001.000203 attaching 961.001.000204.

result in over 257,400,000 deliveries on its platform over the next five years, with an estimated transaction value of $9 billion per year".[319]

253 It was put to Ms Kitchen in cross-examination that the covering email from Mr Armstrong (which stated "[a]ttached is the ASX announcement from GetSwift – they want CBA approval and quote from spokesperson")[320] suggested that he was attaching an ASX announcement, in respect of which GetSwift had sought CBA's approval.[321] Ms Kitchen understood the "they" in the email to mean GetSwift,[322] and that GetSwift were seeking CBA approval of the ASX announcement.[323] It should be noted that both documents attached to Mr Armstrong's email were, on their face, draft *media releases*. Even the document to which Ms Kitchen was taken to during cross-examination[324] was not an ASX announcement, but a document headed "media release".[325] Nor was the other document attached to Mr Armstrong's email (headed "Draft CBA/GetSwift release") an ASX announcement.[326]

254 At 11:32am on 27 February 2017, Mr Armstrong sent an email to Mr Polites (copied to Ms Hughan and Ms Kitchen), with subject line "Draft GetSwift Media Release' informing Mr Polites that there had been a "change of resourcing for this internally" and that "[m]y colleague, Natalie Kitchen, will take over this activity".[327]

255 Ms Kitchen deposed that she did not recall seeing or hearing the 55,000 merchants figure before reading the draft media releases attached to Mr Armstrong's email dated 27 February 2017.[328]

CBA proposed amendments to the CBA Agreement and further discussions

256 At 9:19am on 1 March 2017, Ms Gordon forwarded to Mr Eagle, copied to Mr Hunter and Mr Macdonald, a copy of the CBA Agreement with CBA's amendments.[329] Mr Eagle replied at

[319] 961.001.000204.
[320] 961.001.000197.
[321] T532.27–32 (Day 8).
[322] T532.22–25 (Day 8).
[323] T532.22–42 (Day 8).
[324] T532.44 (Day 8).
[325] 961.001.000208.
[326] 961.001.000204.
[327] 961.001.000210.
[328] Kitchen Affidavit (GSW.0009.0043.0001_R) at [14].
[329] GSWASIC00032179_R attaching GSWASIC00031234.

11:22am (comments redacted) and Mr Hunter replied shortly after "Once we land let's have a conf [*sic*] call to go over this…"[330] At 10:06am, Ms Gordon forwarded to Mr Hunter a copy of the CBA Agreement with CBA's amendments.[331]

257 Also on the morning of 1 March 2017, Ms Kitchen sent an email to Mr Budzevski informing him that:

> The media release needs to be written – which I would like to do today if possible, at least a draft. I have some of the comments from GetSwift, so that is a good start but need your expertise please![332]

258 That afternoon, Ms Kitchen sent another email to Mr Budzevski attaching a draft media release, stating:

> Ahead of catching up tomorrow, I thought I would pull together some of my questions to help pull this media release together. I don't expect you to write it down but just a heads up of what I am thinking we will need to chat about tomorrow! It's very rough and also includes the 'straw man' media release that GetSwift's media contact sent me.[333]

259 Although Ms Kitchen added the CBA logo to the draft media release and removed GetSwift's logo (in order to conform to CBA's internal policy), the media release was otherwise based on the draft media release she had received from Mr Polites.[334] The media release referred to the 55,000 merchants, the 257,400,000 deliveries, and the transaction value of $9 billion per year.

260 The following morning, on 2 March 2017, Ms Kitchen met Mr Budzevski to discuss the draft media release.[335] Following the meeting, Ms Kitchen sent an email to Mr Budzevski stating:

> Thanks for your time this morning. Attached is a very rough draft of a media release. I am still not sure I get all the benefits – but hopefully you will be able to plug in more info or edit as required. …

[330] GSWASIC00032166_R.
[331] GSWASIC00031233 attaching GSWASIC00031234.
[332] 961.001.000249.
[333] 961.001.000277 attaching 961.001.000278.
[334] Kitchen Affidavit (GSW.0009.0043.0001_R) at [19].
[335] Kitchen Affidavit GSW.0009.0043.0001_R) at [20].

261 I have a call with Harrison who the PR rep for GS tomorrow at 9:30am. If you have a chance to review before then that would be great, otherwise I will come back to you with an update from that meeting.[336]

262 Significantly, the draft media release which Ms Kitchen prepared and sent to Mr Budzevski following their meeting had removed the reference to "55,000 merchants" and had inserted the following emphasised text:

> GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform over the next five years, with an estimated transaction value of $9 billion. **(this was provided by GetSwift PR rep)**.[337]

263 This sequence of emails was not put to Mr Budzevski during cross-examination.

264 At 10:24am on 3 March 2017, Ms Kitchen sent an email to Mr Budzevski, asking him to cast his eyes over the draft media release "for your expertise as I am conscious that I am not so familiar with the content".[338] At 2:35pm, Mr Budzevski sent an email to Ms Kitchen advising:

> Have reviewed the release and I think it is a great start.
>
> We probably need to put some more meat on the bone to clearly articulate the value of the partnership and what the solutions actually does.
>
> Did Harrison share any detail on this?[339]

265 Ms Kitchen replied "I didn't get anything back from GetSwift in terms of the value of the partnership, but will send back this afternoon. …I can ask them for assistance and to help with the Q&A too".[340]

GetSwift reaction to the CBA revised draft of the media release

266 At 4pm on 3 March 2017, Ms Kitchen sent an email to Mr Polites stating "attached is the very rough draft media release that I pulled together but I dare say that it needs a bit of clarity of what the partnership will actually be and what the outcome will be for customers".[341] The attached draft media release had no reference to the 55,000 merchants and included "(this was

[336] 961.001.000343 attaching 961.001.000344.
[337] 961.001.000344 (emphasis added).
[338] 961.001.000349.
[339] 961.001.000358.
[340] 961.001.000358.
[341] 961.001.000374 attaching 961.001.000379.

provided by GetSwift PR rep)" beside the figures of 257,400,000 and the estimated transaction value of $9 billion.[342] At 4:09pm, Mr Polites forwarded Ms Kitchen's email to Mr Hunter and Mr Macdonald, stating:

> Bad news regarding timing. …
>
> The good news, is that they are doing a media release on this, with their brand attached!
>
> Initial draft below. It's vague, and they've edited out some of our content. Take a look and we can discuss with you next week.[343]

267 At 8:18pm, Mr Hunter sent an email to Mr Polites, copied to Mr Macdonald, in which he stated "I need the number of merchants on the Albert platform stated and the mutual exclusivity clearer put. … Let's discuss."[344]

Further negotiation of the CBA Agreement

268 On 3 March 2017, Mr Budzevski sent an email to Ms Gordon attaching a revised version of the draft CBA Agreement that included a new clause 3.1(d) in these terms:

> For clarity, CommBank will only load the GetSwift App onto Albert devices with the new merchant category code agreed by the parties in the Project Plan.[345]

269 The rationale for including this clause [3.1(d)] was that CBA had not agreed (and never did agree) that the GetSwift App would be rolled out to all Albert merchants. CBA's position was that, rather than a blanket rollout, the GetSwift App was only to be rolled out to those Albert merchants who fell within the specific merchant code categories that CBA identified as being likely to benefit from the GetSwift App".[346]

270 Mr Budzevski explained that a "CBA merchant" was a business customer who had successfully applied to CBA to receive merchant services from the bank, and an "Albert merchant" was a CBA merchant that had been provided with one or more Albert terminals.[347] He also deposed that the number of Albert merchants as at March 2017 was only 20,000 to 25,000 and that this

[342] 961.001.000379.
[343] GSW.0019.0001.2930 attaching GSW.0019.0001.2931.
[344] GSW.0019.0001.2936.
[345] Budzevski Affidavit (GSW.0009.0044.0001_R) at [36]; GSWASIC00025354 attaching GSWASIC00025356.
[346] Budzevski Affidavit (GSW.0009.0044.0001_R) at [38].
[347] Budzevski Affidavit (GSW.0009.0044.0001_R) at [9].

was a number that he would have known at the time as it was relevant to his role in the product group.[348]

271 Late in the evening of 3 March 2017, Ms Gordon sent an email to Mr Hunter, Mr Macdonald and Mr Eagle, forwarding a revised draft of the CBA Agreement.[349] In the early hours of 4 March 2017, Mr Hunter sent an email providing his comments in relation to some of the terms of the CBA Agreement, and wrote, "Lets [*sic*] chat tonite NYC time/your morning" and provided comments in relation to the proposed commercial terms.[350] Mr Eagle subsequently forwarded Mr Hunter's email to Ms Gordon.[351]

272 On 6 March 2017, Mr Hunter, Mr Eagle and Ms Gordon participated in an email exchange in relation how best to proceed with negotiations in relation to the CBA Agreement.[352] By this point, the contemporaneous documents reveal that the term of the draft CBA Agreement had been the subject of negotiation by CBA, which was considering a term of two to three years, rather than the five years referred to in the drafts of the media release that had been circulated.[353]

Mr Hunter reinserts the 55,000 figure into the draft media release and ASX announcement

273 On 7 March 2017, Mr Polites sent an email to Mr Hunter and Mr Macdonald, attaching a draft media release in which he stated: "Hi guys, Please approve ASAP, then I'll pass to them".[354] The draft media release attached to Mr Polites email did not refer to the 55,000 merchants but did refer to the 257,400,000 deliveries "over the next five years" and the estimated transaction value of $9 billion.

274 At 4:34am on 8 March 2017, Mr Hunter tellingly replied to Mr Polites, stating: "Ahead of the chat with CBA team, please find the revised release. It has minor but VERY important

[348] Budzevski Affidavit (GSW.0009.0044.0001_R) at [55].
[349] GSWASIC00066758.
[350] GSWASIC00066758.
[351] GSWASIC00032135_R.
[352] GSWASIC00066753; GSWASIC00025283; GSWASIC00031228; GSWASIC00066175; GSWASIC00032072_R; GSWASIC00066169; GSWASIC00032103_R; GSWASIC00032089_R; GSWASIC00032089_R; GSWASIC00060143_R; GSWASIC00066508.
[353] GSWASIC00031228; GSWASIC00025184.
[354] GSWASIC00025180 attaching GSWASIC00025181.

additions/changes." [355] Fifteen minutes later Mr Hunter sent another email, with two attachments, stating: "Sorry – sent you a [*sic*] earlier version. Here is both the CBA media push and our ASX announcement".[356] Both the media release and the announcement attached to Mr Hunter's email had reinserted the "55,000 retail merchants" that had been deleted in Ms Kitchen's draft (and retained the references to the projected number of deliveries and estimated transaction value). This was consistent with Mr Hunter's 3 March 2017 email in which he had stated "I need the number of merchants on the Albert platform stated".[357]

275 On 8 March 2017, Mr Macdonald provided further minor comments in relation to the draft media release and ASX announcement.[358] He stated: "Couple of errors in the CBA draft 247,000,00 & Ms yams [*sic*] spelling of GetSwift in bottom quote."[359] Mr Macdonald's email itself contains an error, in that the figure of 247,000,000 was plainly intended to correct the missing zero in "257,400,00" in both documents attached to Mr Hunter's email. There is no reference to "247,000,000" deliveries in any of the prior or subsequent drafts. The second amendment proposed by Mr Macdonald related to an immaterial misspelling of GetSwift in the quote attributed to Ms Yam in both documents.[360]

GetSwift provides CBA with the revised media release with the 55,000 figure reinserted

276 On 9 March 2017, Ms Gordon sent an email to Mr Budzevski, copied to Mr Madoc, attaching a draft media release and stating:

> Here is the draft media release that our PR teams have been working on together…Also note, this is the latest iteration of the draft, and I don't think the CBA folks have seen it yet. Please take from it what you need.[361]

277 The draft media release stated, relevantly:

> Commonwealth Bank of Australia has partnered with GetSwift to offer its more than 55,000 retail merchants the ability to compete with their global counterparts when it comes to deliveries and logistics…
>
> GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform

[355] GSWASIC00047193 attaching GSWASIC00047196, and GSWASIC00047178.
[356] GSW.0019.0001.3011 attaching GSW.0019.0001.3013, and GSW.0019.0001.3015.
[357] GSW.0019.0001.2936.
[358] GSWASIC00025165; GSWASIC00047172.
[359] GSWASIC00025165.
[360] MCS at [197].
[361] GSWASIC00025092 attaching GSWASIC00025094.

over the next five years, with an estimated transaction value of $9 billion.[362]

278 What is notable about this exchange is that, since 24 February 2017, Mr Polites had been liaising directly with CBA's PR team, namely Ms Kitchen, in relation to the draft media release. However, following receipt of the draft media release from Ms Kitchen with the 55,000 retail merchants deleted, and following the re-insertion of the 55,000 by Mr Hunter, GetSwift appears to have chosen to circumvent Ms Kitchen by returning the media release to Mr Budzevski and Mr Madoc via Ms Gordon (without copying Ms Kitchen), rather than using the conventional channel of sending to Ms Kitchen via Mr Polites.

279 In cross-examination, Mr Budzevski agreed that he read the reference to the "55,000 retail merchants" to be a reference to CBA's retail merchants,[363] and that he did not recall any correspondence in which he informed Ms Gordon that CBA did not have 55,000 retail merchants.[364] Similarly, Mr Budzevski gave the following answers to questions that I asked of him:

> Well, when you read it, 55,000 retail merchants, you knew that there wasn't 55,000 retail merchants, didn't you? --- Yes.
>
> …
>
> Well, didn't you assume that the figures in the third last paragraph were somehow connected to the fact that it was saying there was 55,000 retail merchants? --- Yes.
>
> Right. You knew that was wrong, didn't you? --- I did know it was wrong, correct.
>
> Then why didn't you do anything about it?" --- I would have advised our internal PR team.[365]

280 As the documents reveal, Mr Budzevski did inform CBA's internal PR that the figure was wrong. During his cross-examination, Mr Budzevski was not shown the emails in which Ms Kitchen and Mr Budzevski had previously attempted to correct the draft media release by deleting the 55,000 retail merchant figure on 2 March 2017 and had sent a corrected version of the media release without the 55,000 reference to GetSwift on 3 March 2017, only to have the 55,000 retail merchants reinserted by Mr Hunter on the morning of 7 March 2017.

[362] GSWASIC00025094.
[363] T497.13–21 (Day 8).
[364] T497.23–28 (Day 7).
[365] T497.45–498.12 (Day 7).

Mr Budzevski and Ms Kitchen query whether GetSwift figures in media release are global

281 At 7:26am on 9 March 2017, Ms Gordon sent an email to Mr Budzevski attaching a draft media release.[366] At 7:28am, Mr Budzevski replied to Ms Gordon, asking: "Would you have an estimate of how many drivers are using the GetSwift platform in Australia?"[367] Ms Gordon replied, stating:

> The specific number of drivers we have in geographies is a competitively sensitive information for us. What I can share is that we have tens of thousands of drivers across the global platform.[368]

282 Ms Gordon deposed that her reply to Mr Budzevski had been given to her by Mr Hunter on 9 March 2017 for the purposes of responding to Mr Budzevski.[369]

283 At 7:29am, Mr Budzevski sent an email attaching the draft media release that he had received from Ms Gordon to Ms Kitchen, copied to Ms Bronwyn Yam (who, at the time, was CBA's proposed spokesperson for the media release).[370] Mr Budzevski stated, "Latest PR release from GetSwift providing a lot more clarity on the partnership".[371] The media release stated, "Commonwealth Bank of Australia has partnered with GetSwift to offer its more than 55,000 retail merchants … GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform over the next five years, with an estimated transaction value of $9 billion". In cross-examination, Mr Budzevski agreed that he did not tell Ms Kitchen or Ms Yam (at that time) that the 55,000 merchant figure, the 257,400,000, or the $9 billion were wrong, despite knowing that the figures were wrong.[372] However, as explained below (at [285]), by 3:22pm on the same day, the contemporaneous documents make clear that Mr Budzevski had informed them that the numbers appeared to be "a global reference" and that "[GetSwift] should not provide global numbers".[373]

[366] GSWASIC00025041 attaching 961.001.000395.
[367] GSWASIC00025041.
[368] GSWASIC00025041.
[369] Gordon Affidavit (GSW.0009.0021.0001_R) at [144].
[370] 961.001.000394 attaching 961.001.000395.
[371] 961.001.000394 attaching 961.001.000395.
[372] T498.44–499.6 (Day 7).
[373] 961.001.000401.

284 At 10:48am, Ms Kitchen sent an email to Mr Budzevski providing an updated version of the draft media release.[374] Ms Kitchen wrote that she had "just made some minor edits".[375] The release contained the figure of 55,000 retail merchants, had rounded up the number of deliveries to 250 million and retained the estimated transaction value of $9 billion. Again, Mr Budzevski did not immediately respond to Ms Kitchen to inform her that those figures were wrong.[376]

285 At 3:22pm, Mr Budzevski sent an email to Ms Kitchen, copied to Ms Yam, stating:

> The number of GetSwift merchants referenced seems to be a global reference.
>
> We need to pull this back to Australia as CBA only offers the product domestically … The volume of deliver[ies] quoted '250m' over 5 years needs to be positioned in the context of Australia. They should not provide global numbers similar to the point above.[377]

286 In cross-examination in relation to this email, Mr Budzevski said, in relation to the 250 million deliveries or transactions that "GetSwift provided that number, so they've crafted the number of transactions".[378] He also agreed that he thought that the number of merchants was global and, therefore, the number of transactions was global.[379] In his affidavit, Mr Budzevski also explained he "inferred that the number of 257,400,000 and $9 billion were global numbers" because, as far as he was aware (including from both his early discussions with Mr Hunter and Ms Gordon about the start-up nature of GetSwift's business) and from his own knowledge of the size of the market), "GetSwift's business footprint at that time could not have generated such numbers through transactions in Australia alone".[380]

287 At 4:10pm, Ms Kitchen sent an email to Mr Polites (attaching a draft media release) asking:

> The figures in the release appear to be global and we need to use Australian numbers as we only offer the product domestically. I assume this will relate to the merchants and 250 million deliveries/$9 billion. Are you able to adjust these figures?[381]

[374] Kitchen Affidavit (GSW.0009.0043.0001_R) at [32]; Budzevski Affidavit (GSW.0009.0044.0001_R) at [84].
[375] 961.001.000398 attaching 961.001.000399.
[376] T499.28–500.2 (Day 7).
[377] 961.001.000401.
[378] T501.31–33 (Day 7).
[379] T501.45–46 (Day 7).
[380] Budzevski Affidavit (GSW.0009.0044.0001_R) at [86].
[381] 961.001.000409 attaching 961.001.000410.

288 The draft attached to Ms Kitchen's email did not, unlike the draft provided by her on 3 March 2017, remove the reference to "55,000 merchants". It also decreased the projected deliveries from 257,400,000 to 250,000,000.[382]

Mr Hunter responds to CBA query about global figures

289 At 11:21am on 10 March 2017, Mr Polites forwarded Ms Kitchen's email to Mr Hunter and Mr Macdonald, stating: "[t]his was forwarded internally to their media team, by their corporate team. CBA is one entity. Let's assume from now on that anything sent to one division is sent to them all."[383] This email appears to be a reaction by Mr Polites to the failed attempt on the part of GetSwift to circumvent Ms Kitchen in order to get another division of CBA to agree to the draft media release containing numbers previously deleted by Ms Kitchen.

290 At 4:13pm, Mr Hunter replied to Mr Polites, stating:

> Re transactions: 247M transactions divided by 5 years is 49.5m transactions a year. 55,000 merchants is an average of 900 transactions a year, which is 75 a month. Considering we have single merchants that are doing l00k+ a month its [*sic*] a direct Australian market potential (we are about to sign up a single customer that will give us 13M transactions over 5 years for example). The aggregate sum of 9$b is the value of goods the transactions are projected to achieve when spun up.[384]

291 At 4:16pm, Mr Polites passed on this rationale to Ms Kitchen and stated "[a]gain, apologies for the delay here on our end. I had to nail down a time to get the guys to spell out the value of the integration."[385] Ms Kitchen agreed in cross-examination that she understood from this email that the "55,000 figure was the basis for the projected number of transactions, the 247 million" and "also for the aggregate transaction value which is the billion figure referred to in the last sentence".[386] Indeed, she understood that the figures were "intimately connected".[387]

292 At 4:33pm, Mr Polites sent an email to Ms Kitchen in which he stated that he believed the figures in the draft media release were for Australia.[388] Mr Polites deposed: "I assumed that the

[382] MCS at [201].
[383] GSWASIC00047029.
[384] GSWASIC00047029.
[385] 961.001.000436.
[386] T534.33–41 (Day 8).
[387] T535.28–29 (Day 8).
[388] 961.001.000458.

figures were for Australia. I did not speak to Hunter or Macdonald about whether or not the figures were for Australia".[389]

293 At 1:57pm on 14 March 2017, Ms Kitchen sent an email to Ms Yam (copied to Mr Budzevski), attaching a draft media release. In this email Ms Kitchen stated:

> GetSwift have confirmed that these are Australian figures. Below is the message from Harrison with the rationale from Bane Hunter.
>
> 'Re transactions: 247M transactions divided by 5 years is 49.5m transactions a year. 55,000 merchants is an average of 900 transactions a year, which is 75 a month. Considering we have single merchants that are doing 100k+ a month its a direct Australian market potential (we are about to sign up a single customer that will give us 13M transactions over 5 years for example) . The aggregate sum of 9$b is the value of goods the transactions are projected to achieve when spun up.'[390]

294 The draft media release attached to Ms Kitchen's email referred to 55,000 retail merchants, 250 million deliveries over the next five years, with an estimated transaction value of $9 billion.[391]

295 When reading the email from Ms Kitchen, Mr Budzevski understood that the number of transactions was tied intimately to the number of retail merchants; in particular, the value of the goods in the transactions depended upon the number of transactions, and the number of transactions depended upon the number of retail merchants.[392]

Further consideration by Mr Budzevski and Ms Kitchen of the 55,000 figure

296 Between 5:24pm and 10:56pm on 14 March 2017, Ms Kitchen and Mr Budzevski settled a draft 'question and answer' document (**Q&A Document**).[393] The purpose of the Q&A document was to assist CBA's spokesperson to respond to any media queries.[394]

297 At 11:01am on 15 March 2017, Ms Kitchen sent an email to Mr Polites attaching the Q&A Document and stating: "Attached is a very rough draft of a Q&A I have started to pull together.

[389] Polites Affidavit (GSW.0009.0019.0001_R) at [79].
[390] 961.001.000483 attaching 961.001.000484.
[391] 961.001.000484.
[392] T502.3–503.25 (Day 7).
[393] 961.001.000490 attaching 961.001.000491; 961.001.000498 attaching 961.001.000500.
[394] Kitchen Affidavit (GSW.0009.0043.0001_R) at [44].

We will need some GetSwift expertise for some of these …"[395] The Q&A document attached to her email stated, relevantly:

> 55,000 retail merchants – CBA's retail merchants? Is this all the retailers that have Albert?
>
> Does that mean that all the retailers have Albert? No, not all retailers have Albert.[396]

298 At 11:07am, Mr Polites forwarded Ms Kitchen's email to Mr Hunter, copied to Ms Hughan.[397]

299 Later that afternoon, Ms Kitchen and Mr Budzevski had the following email exchange:

> Ms Kitchen: Just with the figure of 55,000 retail merchants – do all these retailers have Albert? Do we know the split of the types of retailers in this figure?
>
> …
>
> Mr Budzevski: The 55,000 retail merchants is a number that GetSwift supplied. I imagine this is their total retail network around the globe which would be of no value in the announcement. Unless Getswift have an Australian target that they can confirm, I would be comfortable with simply saying that 'Getswift would be made available on the Pi platform for merchants to download as required.'
>
> Ms Kitchen: Do we know how many of our CBA retail merchants will be able to access this?
>
> Mr Budzevski: All CBA Albert retail merchants can access the app through App bank. I will need to get some stats on the exact number of [merchants] in the general retail category.[398]

300 At 2:23pm on Thursday, 16 March 2017, Mr Hunter replied to Mr Harrison's email attaching the Q&A document, stating: "See attachment with our notes".[399] The attached Q&A contained the following additional text inserted by Mr Hunter or Mr Macdonald:

> Does that mean that all the retailers have Albert? No, not all retailers have Albert, but our joint network will reach more than 55k merchants.[400]

[395] 961.001.000517 attaching 961.001.000518.
[396] 961.001.000518.
[397] GSW.0027.0001.4622 attaching GSW.0027.0001.4624.
[398] 961.001.000525; 961.001.000527; 961.001.000530; Budzevski Affidavit (GSW.0009.0044.0001_R) at [94]–[98].
[399] GSW.0027.0001.4575 attaching GSW.0027.0001.4577.
[400] GSW.0027.0001.4577 at 4579.

301 At 3:39pm, Mr Polites forwarded the amended Q&A document he had received from Mr Hunter to Ms Kitchen.[401]

Ms Kitchen again queries the 55,000 figure with Mr Polites and Mr Budzevski

302 On 17 March 2017, at 3:55pm, Ms Kitchen emailed Mr Polites stating "The 55,000 merchants …are they GetSwift's merchants, or CBA's or the reach combined?"[402] Mr Polites responded "I believe that's only CBA merchants. I think Jace gave us that fact".[403] The reference to 'Jace' was a reference to Jason Armstrong of CBA. At 4:01pm, Ms Kitchen sent an email to Mr Budzevski in which she stated:

> Can I confirm with you the number of merchants that this will be made available to? This figure of 55,000 retail merchants seems high and it appears that Jace might have provided Harrison this stat – but I want to make sure we have double checked it...[404]

303 Mr Budzevski gave evidence during cross-examination that he knew from this email that Ms Kitchen was saying that Mr Armstrong ("Jace") "might have provided Mr Polites on behalf of GetSwift the figure of 55,000 retail merchants".[405] Mr Budzevski stated that he relied on Ms Kitchen to point out to GetSwift any correction that needed to be made in the draft media releases".[406]

304 At 4:19pm on 17 March 2017, Ms Kitchen returned to her email thread with Mr Polites and stated: "Oh dear.... Jace says it's not from him. I am on the hunt to confirm this fact now!"[407] At 4:33pm, Mr Polites forwarded to Ms Kitchen an email from Mr Hunter to Mr Chambers dated 13 February 2017 and stated: "It came from Edward on the Albert team. Hope that helps".[408] At 4:34pm, Mr Polites replied to Ms Kitchen's 4:19pm email by stating: "Sent you my first reference of it. Came from Edward. Paper trails can be a godsend!"[409]

[401] 961.001.000554 attaching 961.001.000556.
[402] 961.001.000607.
[403] 961.001.000607.
[404] 961.001.000585.
[405] T505.2–29 (Day 7).
[406] T505.35–36 (Day 7).
[407] 961.001.000592.
[408] GSW.0027.0001.4534.
[409] 961.001.000607.

305 However, the email Mr Polites forwarded to Ms Kitchen at 4:33pm is an email in which the figure 55k+ SMEs is mentioned; however, it is an email *from* Mr Hunter *to* Mr Chambers, not an email from Mr Chambers to Mr Hunter. Mr Polites explained in his affidavit that he believed the reference to "Edward" in his emails to Ms Kitchen on 17 March 2017 was a mistake and that the emails should instead have referred to Mr Hunter, who was the author of the "55k+ SME clients" in the email he had forwarded to Ms Kitchen.[410] Mr Polites' explanation for his error was not challenged in cross-examination.

306 At 4:39pm, Ms Kitchen sent an email to Mr Chambers (copied to Mr Budzevski), in which she stated:

> I hope you are well. Attached is the most final draft of the media release for the announcement with GetSwift. I understand that you provided the 55,000 retail merchants figure and I am just trying to double check this and verify it. Always good to check and then double check figures in a media release![411]

307 Mr Budzevski did not respond to this email and did not take any steps to inform Mr Chambers that the number of retail merchants was wrong.[412]

308 Mr Chambers deposed that he was not in the office when Ms Kitchen sent her email on 17 March 2017,[413] and that he did not respond to Ms Kitchen about the 55,000 figure after the 17 March 2017 email because:

> … by the time I had returned to the office, the information I received at that time was that CBA had postponed any joint media release (which was the subject of Kitchen's email) until after an app had been completed.[414]

309 In cross-examination, Mr Chambers was taken to the following further exchange that occurred in his private examination:

> Q: Now, Ed, did you give that number to Natalie or anyone else at CBA?
>
> A: From the email from Natalie on 17 March it suggested that I did give that 55,000 retail merchant figure.
>
> Q: Who did you give it to, to a person at CBA or did you give it to someone at

[410] Polites Affidavit (GSW.0009.0019.0001_R) at [94].
[411] 961.001.000610 attaching 961.001.000611.
[412] T506.15–507.34 (Day 7); Budzevski Affidavit (GSW.0009.0044.0001_R) at [102].
[413] Chambers Affidavit (GSW.0009.0018.0001_R) at [33].
[414] Chambers Affidavit (GSW.0009.0018.0001_R) at [35] (although this evidence was subject to a ruling pursuant to s 136 of the EA limiting its use to the fact of the representation not its truth).

GetSwift?

A: I don't recall who I gave it to in that period of time.[415]

310 Mr Chambers was asked by the cross-examiner: "what you were saying to ASIC was, first, that you thought you were the source of the 55,000 retail merchants figure in the draft release, correct?" to which Mr Chambers replied "correct".[416] However, he could not actually recall whether he had given that figure to CBA or GetSwift.[417] Mr Chambers also said that it was "clear" that if GetSwift got the number of 55,000 retail merchants, it must have got the number from someone at CBA.[418] That person, he accepted, could have been Mr Madoc, but it equally could have been him.[419] Further, he accepted that not only would it have been his role to know the figure of 55,000 retail merchants,[420] but he believed the figure of 55,000 retail merchants was an "official figure of the bank" and was "accurate as at March 2017".[421]

311 The passage of the private examination transcript to which Mr Chambers was taken in his cross-examination shows that in Mr Chambers' first answer, he was speculating, on the basis that it had been suggested to him that he was the source of the 55,000 number in Ms Kitchen's email. This is consistent with the answer he gave to the question in cross-examination; namely, that he *thought* he was the source of the 55,000 (based on the suggestion in Ms Kitchen's email), not that he independently knew he was the source of the 55,000 figure. Mr Chambers was not asked, in cross-examination, the basis for him *thinking* he was the source of the 55,000, other than by reference to Ms Kitchen's email.

312 Indeed, as Mr Chambers deposed in his affidavit, "[t]he email from Kitchen suggested that I was the source of the 55,000 figure. However … as best as I can recall, I did not give any representative of GetSwift that figure."[422]

313 Next, it was put to Mr Chambers in cross-examination that:

[T]he second thing you were saying to ASIC was that you couldn't recall whether you

[415] T476.24–477.14 (Day 7); Chambers Private Examination Transcript (GSW.0005.0007.0001) at 23.5–13.
[416] T477.41–43 (Day 7).
[417] T477.45–478.5 (Day 7).
[418] T481.13–14 (Day 7).
[419] T481.16–46 (Day 7).
[420] T478.45–479.2 (Day 7).
[421] T478.3–16 (Day 7); T479.42–46 (Day 7).
[422] Chambers Affidavit (GSW.0009.0018.0001_R) at [32].

> had given that figure to a person at CBA or to a person at GetSwift. That's really what you were saying at line 12, isn't it? --- Correct".[423]

314 Mr Chambers' answer to this question in his private examination, and equally in cross-examination, does not relevantly advance the matter. Neither ASIC, nor the cross-examiner, established that Mr Chambers was the source of the 55,000, or that he had in fact, given anyone the 55,000 number, as opposed to Mr Chambers agreeing that Ms Kitchen's email *suggested* he was the source.

315 This conclusion is fortified by other references in the private examination transcript, in which Mr Chambers gave evidence he could not recall "imparting [the 55,000] number" in any of the meetings or calls",[424] nor "a particular conversation with Joel Macdonald about the number of retail merchants at CBA".[425] Further, Mr Chambers deposed in his affidavit, to which no objection was taken and upon which he was not cross-examined, that:

> I do not know where the figures of 55k+ SMEs … contained in Hunter's email came from. As best as I can recall, I did not give any representative of GetSwift those figures.[426]

316 In context, I accept that Mr Chambers' could not recall any conversation with Mr Hunter or Mr Macdonald in which he gave either of them the number of 55,000 retail merchants and Mr Polites had mistakenly identified Mr Chambers as the source of the figure because he inadvertently mistook Mr Chambers as the author, not the recipient, of the email he forwarded to Ms Kitchen.

Mr Budzevski's further consideration of the 55,000 retail merchant figure

317 At 7:21pm on 17 March 2017 (to which Mr Budzevski erroneously refers in his affidavit as being sent at 4:41pm), Mr Budzevski replied to Ms Kitchen's earlier email explaining:

> I don't have the total count, as this is being collated by our analytics. Not sure where the 55K came from but it does not represent CBA merchants.[427]

[423] T478.3–5 (Day 7).
[424] T480.20–30 (Day 7); Madoc Private Examination Transcript (GSW.0005.0007.0001) at 34.12–14.
[425] T480.20–30 (Day 7).
[426] Chambers Affidavit (GSW.0009.0018.0001_R) at [14]–[15].
[427] 961.001.000622; Budzevski Affidavit (GSW.0009.0044.0001_R) at [100].

318 Mr Budzevski agreed, in cross-examination, that he relied on Ms Kitchen to point out to GetSwift any correction that needed to be made in the draft media releases,[428] but also said that he drew the 55,000 figure to Ms Kitchen's attention, as she was engaging on the PR release as CBA's PR lead.[429] Mr Budzevski agreed, in cross-examination, that by his 7:21pm email, he was saying that the whole basis of the media release, and the basis for all the figures in that media release, was wrong.[430] This was the first time Ms Kitchen had been told that 55K did not represent CBA merchants and, at that time, she "wasn't sure either way" whether the figure of 55,000 merchants was wrong.[431]

319 At 10:28am on Monday, 20 March 2017, Ms Kitchen sent an email to Mr Budzevski (copied to Ms Yam), in which she stated:

> As mentioned, as I questioned the merchant figure, I would like to get this as soon as we can because it impacts the other figures in the release. Apparently it came from Ed Chalmers [*sic*] but I have not heard back from him as yet to whether this is correct and if we did provide it to Bane Hunter, how we calculated it.[432]

320 By the time of these emails, Ms Kitchen agreed that she was still unsure at this time whether the figure of 55,000 merchants was correct and whether it had been provided to Mr Hunter.[433] In cross-examination, Mr Budzevski agreed that this "was a bit of a serious issue … because it looked like the Commonwealth Bank had two different numbers internally".[434] Mr Budzevski also agreed that there were two candidates for who in the Commonwealth Bank might have supplied the number: Mr Armstrong and Mr Chambers,[435] and that either of those candidates would be inconsistent with GetSwift having provided the figure, which was his previous understanding.[436]

321 At 11:47am, Mr Budzevski sent an email to Ms Kitchen and Ms Yam stating:

> The premise of the partnership is to build an app on Albert and make the GetSwift

[428] T505.35–36 (Day 7).
[429] T505.31–33 (Day 7).
[430] T506.9–13 (Day 7).
[431] T538.1–17 (Day 8).
[432] 961.001.000635.
[433] T538.19–44 (Day 8).
[434] T507.40–46 (Day 7).
[435] T508.25–44 (Day 7).
[436] T508.25–44 (Day 7).

> solution available for merchants using Albert.
>
> The analytics team are extracting the data on our retail merchants which I will share asap.
>
> Note, we should not quote the 55,000 as this is not a true reflection of our device/merchant position.[437]

322 At 10:59pm, Mr Budzevski sent an email to Ms Kitchen advising her:

> I have looked into the number of devices within the 'retail' portfolio and they seem quite underwhelming.
>
> From our analysis, there only seems to be 3000 devices active in this portfolio.
>
> I think we should avoid quoting merchant or terminal numbers and focus the opportunity for merchants.[438]

323 Asked in cross-examination why the word "retail' was in quotes, Mr Budzevski replied that he was "[n]oting that … we specifically provided a designation of the retail merchant category code".[439] When it was put to Mr Budzevski that he "knew that there were more devices than that, that could properly be characterised as a device used by a retailer", Mr Budzevski replied, "[u]nder our designation, retailer fell – the number of devices within that retail category code is the 3000 active devices."[440] Indeed, Mr Budzevski disagreed with the proposition "that the categorisation does not provide an accurate estimate of the number of devices actually being used by retailers, reaffirming it was right that there were only 3000 devices actually being used by retailers at this point.[441] Mr Budzevski's answers in cross-examination are consistent with the explanation he provided about CBA's application of merchant category codes in his affidavit.[442] Although every new CBA merchant was assigned an industry sector specific merchant category code as part of its CBA customer profile, there was also a grouping (or "designation") available through MasterCard which grouped specific category codes into the category "retail", namely:

> There was a retail categorisation under what we call the merchant category code – the merchant category code designation as per the Mastercard MCC … Under the designation that [CBA] apply from Mastercard, retailers who qualify for that [retail]

[437] 961.001.000639.
[438] 961.001.000673.
[439] T510.6–7 (Day 7).
[440] T510.16–19 (Day 7).
[441] T510.21–32 (Day 7).
[442] Budzevski Affidavit (GSW.0009.0044.0001_R) at [11]–[12].

> category code do have it correctly applied.[443]

324 The cross-examination of Mr Budzevski evidences that the number of Albert devices actually being used by CBA retail merchants as at 20 March 2017 was 3000. This was made clear in response to the following questions I posed to Mr Budzevski:

> You had reached the view by 20 March that there were only 3000 devices active with retailers? --- Yes.
>
> Of any description? --- Yes.[444]

325 There is however no evidence that anybody from CBA informed GetSwift that this was the number of Albert devices actually being used by CBA retail merchants as at 20 March 2017.

Further exchange of drafts of the CBA Agreement

326 At 3:40pm on 20 March 2017, Mr Budzevski sent an email to Mr Hunter, Mr Macdonald and Ms Gordon, attaching "the final" draft of the CBA Agreement "with changes incorporated".[445] The term of this draft agreement remained five years. On the evening of 20 March 2017, Mr Budzevski, Mr Hunter, Mr Macdonald, Ms Gordon and Mr Eagle exchanged emails about the draft CBA Agreement.[446]

327 At 1:53pm on 21 March 2017, Ms Kitchen replied to Mr Budzevski's email from the previous night about the 3000 active devices, stating:

> Is this something GetSwift know? I have attached the updated media release with the numbers taken out. In terms of our broader retail customers, I assume it is more than 3000? I will send this back to GetSwift.[447]

328 In the attached media release,[448] Ms Kitchen had removed the references to 55,000 retail merchants and the 257,400,000 deliveries and $9 billion transaction value.[449]

329 In cross-examination, Ms Kitchen agreed that she had removed the 55,000 figure because Mr Budzevski had suggested to her that the release should avoid quoting merchant or terminal

[443] T510.29–36 (Day 7).
[444] T511.6–12 (Day 7).
[445] GSWASIC00058234 attaching GSWASIC00058236.
[446] GSWASIC00024168 attaching GSWASIC00058159; GSWASIC00024255 attaching GSWASIC00058195; GSWASIC00031992_R; GSWASIC00032447_R; GSWASIC00024173; GSWASIC00066730.
[447] 961.001.000696 attaching 961.001.000698.
[448] 961.001.000698.
[449] T539.27–37 (Day 8).

numbers,[450] and removed the other figures because she understood those figures were based on the number of retail merchants.[451] However, Ms Kitchen stated that she was still "unsure as to what the number of retail merchants was", given she had been told that Mr Chambers had provided that number to GetSwift and she had sought to verify those numbers with him, but had not heard from him.[452] This is perhaps not surprising, considering even Mr Budzevski was unsure what the precise number of relevant retail merchants was, though by this time he had ascertained, and informed Ms Kitchen, that 55,000 was incorrect and that the number of devices active in the retail portfolio was only 3,000 (as described above). Mr Budzevski agreed in cross-examination that he knew "at that point that there was an issue that it had been suggested that someone at the Commonwealth Bank had said to GetSwift that there were 55,000 retail merchants".[453]

330 At 6:36pm on 21 March 2017, Mr Budzevski replied to the email from Ms Kitchen in which she had asked "In terms of our broader retail customers, I assume it is more than 3000", stating "we do not provide that level of detail on merchant footprint. Broader rollout could be in excess of 50,000 terminals or 25,000 merchants. Note, we do not reference merchant numbers.[454]

331 On 22 March 2017, Ms Kitchen sent an email to Mr Budzevski in which she stated, "Great. I have taken out the merchant numbers."[455] By this time, a decision had also been made by CBA not to issue a joint media release with GetSwift, at least not until an app had been deployed.[456] This is evidenced by the following email exchange between Ms Yam and Mr Budzevski (copied to Ms Kitchen) that afternoon:

> Ms Yam at 12:10pm: The sentiment I'm getting from Kelly [Rosmarin] and Michael is that we should not announce anything until we actually have the app … What would be the repercussions with GetSwift if we don't go ahead?
>
> Mr Budzevski at 12:15pm: I don't believe there will be any significant fallout. GetSwift are still able to make their own announcement and publish to the ASX. We would simply stay silent.

[450] T539.39–41 (Day 8).
[451] T539.43–45 (Day 8).
[452] T540.1–8 (Day 8).
[453] T511.16–47 (Day 7).
[454] 961.001.000707.
[455] 961.001.000714.
[456] T540.20–25 (Day 8).

> Ms Yam at 1:06pm: Let's do that …
>
> Mr Budzevski at 3:46pm: This has been all sorted guys. GetSwift understand our position and are happy to delay until the app is deployed.[457]

332 At 5:31pm, Mr Budzevski sent an email to Ms Kitchen stating, "GetSwift have agreed to hold on any announcement. Can you please ensure we do not approve any GetSwift announcement without CBA approval given our position? I would not want GetSwift to go out with messaging that may not align to our position".[458] In cross-examination, Mr Budzevski confirmed that he wanted to make sure that CBA approved the announcement that GetSwift was intending to make to ensure that it aligned with the CBA's position.[459] He also confirmed that Ms Kitchen would have the primary role for obtaining the necessary approvals, but that he had a responsibility to point out any inaccuracies the extent that any draft release was passed by him.[460]

333 In the afternoon of 22 March 2017, Mr Hunter, Mr Macdonald and Ms Gordon exchanged emails about the terms of the CBA Agreement.[461] Mr Eagle provided comments, although these are redacted.[462] At 10:15pm, Ms Gordon forwarded Mr Eagle's comments on the CBA Agreement to Mr Budzevski, stating: "Please find below the note from our legal and the updated attached contract."[463]

334 On 23 March 2017, Mr Chambers replied to Ms Kitchen's 17 March 2017 email, stating: "Am just back in today and understand that this has now been all pushed back out from an announcement perspective?"[464]

335 On 24 March 2017, Mr Hunter sent an email to Ms Gordon, copied to Mr Macdonald and Mr Eagle, in which he stated:

> As you may have noticed due to the delay in our overall PR (because we put it all on hold for CBA expecting to put out our release) our stock price has taken a hit from 64c to low 50s – which is exactly like I feared. So this has had a [*sic*] impact of roughly

[457] 961.001.000741.
[458] 961.001.000744.
[459] T517.25–26 (Day 7).
[460] T517.31–36 (Day 7).
[461] GSWASIC00031980_R; GSWASIC00031976_R; GSWASIC00031958_R.
[462] GSWASIC00031976_R.
[463] GSWASIC00024091.
[464] 961.001.000758; Chambers Affidavit (GSW.0009.0018.0001_R) at [34].

> $12million in our market cap … We will NOT entertain any negative impacts to our core business. In May I have commitments from multiple investors for millions of$ of capital - and I will not ruin my relationship, reputation or trust with them, or put this company in a holding pattern as a result.[465]

336 On 27 March 2017, Mr Budzevski sent an email to Ms Kitchen, attaching a draft of the CBA Agreement.[466] Mr Budzevski deposed that:

> The term of the agreement in that version of the document was changed to 2 years (in previous drafts the term was either 3 or 5 years). My recollection is that this change was made because CBA did not typically agree to long term agreements in relation to new or emerging forms of technology especially where that agreement required exclusivity.[467]

337 Mr Budzevski agreed the reason for this was CBA "wanted to wait and see how successful the new technology was" and "if it was successful, CBA wanted to have the option to continue with it".[468] Further, Mr Budzevski agreed that the two-year term was subject to the extension period in cl 6(c) in the agreement.[469] It was also put to Mr Budzevski that "although the term was reduced to two years, it was with an option to renew for another two years".[470]

338 Regardless of Mr Budzevski's subjective musings as to these questions, these are matters of contractual construction, to be assessed objectively. An extension of the exclusivity period pursuant to cl 6(c) is distinct from and not equivalent to an option to extend the term of the CBA Agreement. On its face, cl 6(c) of the CBA Agreement did not provide "an option to renew" the CBA Agreement for "another two years". Rather, it only provided that "[t]he Exclusivity Period may be extended for an additional period of 24 months, with the same terms in this clause applying, by the written consent of both parties.[471]

339 Also on 27 March 2017, Mr Hunter sent an email to Mr Polites, providing him with two versions of a draft ASX announcement.[472] Both versions contained the following statements: (a) "Commonwealth Bank of Australia has partnered with GetSwift to offer its more than

[465] GSWASIC00031219.
[466] GSWASIC00024009 attaching GSWASIC00064646.
[467] Budzevski Affidavit (GSW.0009.0044.0001_R) at [46].
[468] T493.20–32 (Day 7).
[469] T493.12–18 (Day 7).
[470] T493.30–31 (Day 7).
[471] GSWASIC00064646 at 8.
[472] GSW.0019.0001.3476 attaching GSW.0019.0001.3478, and GSW.0019.0001.3480.

55,000 retail merchants the ability to compete with their global counterparts when it comes to deliveries and logistics"; and (b) "GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform over the next five years, with an estimated aggregate transaction value of $9 billion".

Execution of the CBA Agreement

340 On 20 March 2017,[473] 22 March 2017,[474] and 27 March 2017,[475] Mr Eagle provided further comments in relation to the draft CBA Agreement. At 9:21am on 28 March 2017, Mr Budzevski sent an email to Ms Gordon indicating that the execution version of the CBA Agreement would be sent to GetSwift once Mr Budzevski obtained "internal sign-offs".[476]

341 At 11:37am, Mr Budzevski sent an email to Ms Gordon providing a copy of the "final executable version of the agreement for GetSwift to execute".[477] Ms Gordon forwarded the agreement to Mr Hunter, Mr Macdonald and Mr Eagle, and at 8:26pm, Mr Macdonald sent an email to Ms Gordon attaching the CBA Agreement executed on behalf of GetSwift.[478] At 8:36pm, Mr Hunter sent an email to Ms Gordon requesting her to "send this right away to CBA so we can get a counter signature. Once that is done I will ping them w the ASX announcement PR stuff - not before!"[479] At 8:41pm, Ms Gordon sent an email to Mr Budzevski attaching a copy of the CBA Agreement executed on behalf of GetSwift.[480]

342 On 31 March 2017, Mr Budzevski sent an email to Mr Hunter, Mr Macdonald and Ms Gordon attaching a copy of the CBA Agreement countersigned on behalf of CBA.[481] At 12:01pm, Mr Hunter forwarded this to Mr Eagle, stating: "Had to call them myself yesterday to get this. At least we are there!"[482]

[473] GSWASIC00031989.
[474] GSWASIC00031976.
[475] GSWASIC00031953.
[476] GSWASIC00068137.
[477] GSWASIC00023944 attaching GSWASIC00064580.
[478] GSWASIC00023842 attaching GSWASIC00064552.
[479] GSWASIC00032457.
[480] GSWASIC00023836 attaching GSWASIC00064539.
[481] GSWASIC00062595 attaching CBA Agreement (GSWASIC00062596).
[482] GSWASIC00023608 attaching GSWASIC00064502.

Final arrangements for the CBA Announcement

343 At 9:10am on 3 April 2017, Mr Hunter sent an email to a number of recipients, including Mr Budzevski, Ms Kitchen, and Mr Madoc of CBA, attaching two different ASX announcements. In this email, Mr Hunter stated:

> In addition to this as with any successful national product launch creating a level of demand and registering interest is critical as part of our ability to prioritize, but probably more important than that is securing the first mover advantage from our competition (ANZ, WetsPac etc).
>
> Therefore the last item I just wanted to follow up quickly with is both a minor procedural issue, but one that is rather important. We need to release this information to the ASX this week as part of our regulatory compliance requirements - I firmly believe that we should leverage this announcement with a standard PR release as originally proposed (and one which we have jointly collaborated on). I am including two versions of the ASX release - one which does not attribute any commentary by CBA and one which does as originally agreed to. We would prefer to release the joint one, but as agreed we will always consult with you first before taking any moves in that direction.[483]

344 Both drafts of the ASX announcement included the reference to the 55,000 retail merchants, as well as the 257,400,000 deliveries and $9 billion transaction value.

345 Mr Budzevski did not respond to the email from Mr Hunter.[484] It was put to Mr Budzevski in cross-examination that "at that point you could have, couldn't you, replied all to this email?" and "you could have said to Mr Hunter 'whichever version you go with, you better take out the 55,000 retail merchants and the 257 million deliveries' because at that stage you thought they were wrong".[485] Mr Budzevski said that he "could have, yes" but he did not recall if he did so.[486] These questions, however, while forceful, fail to take into account Mr Budzevski's affidavit evidence, in which he deposed: "I do not recall whether I read these documents at the time or whether I noticed that these figures were referred to in the versions of draft ASX announcement."[487]

[483] GSWASIC00023573; GSWASIC00023575; GSWASIC00023577. See also the following duplicates, as referred to during cross-examination 961.001.000793; 961.001.000795, and 961.001.000797.
[484] T517.38–519.2 (Day 7).
[485] T518.38–45 (Day 7).
[486] T518.38–45 (Day 7).
[487] Budzevski Affidavit (GSW.0009.0044.0001_R) at [117].

346 At 9:20am, Mr Hunter sent Mr Mison, Mr Macdonald, Mr Eagle and Ms Gordon an email with the subject line "HIGHLY CONFIDENTIAL", which stated:

> Scott – **HIGHLY CONFIDENTIAL**
>
> This is to be **released preciously** [*sic*] **at a few minutes before 8am, Sydney Time, on Tuesday April 3rd. Mark it as PRICE SENSITIVE** (needless to say it will be a huge thing) …
>
> **Joel – please confirm this is ok. Brett/Jamila – any comments or questions? Please note this was provided and screened by CBA so changes if any are going to be restricted**.[488]

347 At 9:24am, Ms Kitchen forwarded Mr Hunter's email to Mr Budzevski and asked "My understanding was that when you spoke with GetSwift we had agreed to hold off on a press release until the app was available?"[489] At 9:30am, Mr Budzevski replied to Ms Kitchen stating: "That is correct. GetSwift are welcome to announce to the ASX but it will not include comment from CBA".[490] Ms Kitchen responded at 9:50am, "Are you happy for me to confirm this with Bane?"[491] In cross-examination, Ms Kitchen agreed that she was seeking confirmation from Mr Budzevski that "he was happy for the ASX announcement to be made on behalf of GetSwift in the terms provided by Mr Hunter that did not include the comment from CBA".[492]

348 At 9:51am, Mr Polites followed up Mr Hunter's email with Ms Kitchen, to which Ms Kitchen responded at 10:00am on both the request for joint media and on the terms of the ASX announcement:

> In terms of a joint release, the business does not want to announce this until the app is ready. Lets [*sic*] work towards a time-frame for release according to this adjusted approach.
>
> **The ASX announcement refers to 55,000 merchants which is incorrect. The actual retail merchant number isn't available.** I would also suggest that Bronwyn Yam isn't quoted in the ASX announcement.
>
> I appreciate that GetSwift are keen to announce this partnership, however we just need to work to a different timeframe.
>
> Happy to have a chat and also happy to convey this back to Bane to ensure consistency

[488] GSWASIC00030359 (emphasis in original).
[489] 961.001.000814.
[490] 961.001.000814.
[491] 961.001.000814.
[492] T548.40–44 (Day 8).

of message.[493]

349 On the *former*, Ms Kitchen stated: "the business does not want to announce this until the app is ready." On the *latter*, Ms Kitchen stated: "The ASX Announcement refers to 55,000 merchants which is incorrect. The actual retail merchant number isn't available".[494] Ms Kitchen agreed in cross-examination that in her response to Mr Polites, she intended to convey that she "had no other objection to the ASX announcement beyond those two matters identified in the paragraph".[495]

350 Further, Ms Kitchen agreed in cross-examination that she responded to Mr Polites: (a) before she had received a response from Mr Budzevski to her email of 9:50am; (b) without a response from Mr Chambers as to whether he was the source of the 55,000; and (c) when she did not know whether the number of 55,000 was correct either way.[496] Ms Kitchen also agreed that because she wasn't sure about the number of merchants, she did not suggest that the number of deliveries be removed from the announcement or that the aggregate transaction value be removed.[497]

351 It is important to foreshadow that there is some dispute as to whether this email was unclear, contradictory or ambiguous. I will resolve this dispute when I return to this issue below in respect of the existence of the factual circumstances alleged by ASIC.[498]

352 At 10:04am, Mr Budzevski replied to Ms Kitchen's email of 9:50am, "Sure thing".[499] Notably, he made no mention of the figure of 55,000 or that the CBA Agreement would result in over 257,400,000 deliveries on its platform or an aggregated transaction value of over $9 billion over the next five years. At 10:11am, Mr Polites forwarded Ms Kitchen's email to Mr Hunter and Mr Macdonald advising:

> No chance of joint media. You may want to correct that fact in the ASX announcement, otherwise CBA will issue a correction announcement -- which isn't a good look. I'll see if I can get it out of Natalie [Kitchen]…

[493] 961.001.000812 (emphasis added).
[494] 961.001.000812; Kitchen Affidavit (GSW.0009.0043.0001_R) at [86]–[87].
[495] T552.37–45 (Day 8).
[496] T550.21–37 (Day 8).
[497] T550.33–37 (Day 8).
[498] GCS at [382].
[499] 961.001.000814.

> From here, we can plant an exclusive and circulate the ASX announcement on the day. I can pitch the exclusive as soon as today and work with a reporter with timing. My only bit of hesitation is CBA may turn hostile here from media perspective and refuse to offer a comment if approached by a journalist. They are already retracting their spokespersons [*sic*] quote.[500]

353 At 10:14am, Mr Hunter replied to Mr Polites "Ok what changes do we need to make? Lets [*sic*] keep it in sync with their needs."[501] Mr Hunter sent a further email at 10:17am proposing "a quick call now".[502] There is no evidence that the call in fact occurred and Mr Polites makes no mention of it having occurred in his affidavit, despite having referred to the email.[503] It is unlikely that there was time to arrange and conduct a call prior to Mr Hunter proceeding to amend and twice circulate the draft CBA announcement within the next nine minutes.

354 Indeed, at 10:21am, Mr Hunter sent an email to Mr Polites (copied to Mr Macdonald and Ms Hughan) attaching a further draft of the CBA announcement which excluded the reference to "55,000 retail merchants" but included the projections.[504]

355 At 10:26am, Mr Hunter sent an email to a number of recipients, including Mr Macdonald, Mr Budzevski, Ms Kitchen, and Mr Madoc, stating:

> Quick feedback from Harry and Natalie – in order to make sure we are all in sync and at the same time in compliance with ASX regulatory requirements we will go with the version that omits any quotes from CBA. We will do a joint PR push when the product has been deployed. We have also removed any reference to the number of merchants in our joint network.[505]

356 The reference to 55,000 retail merchants had been removed in the draft ASX announcement attached to Mr Hunter's email, but the figures for 257,400,000 deliveries and $9 billion transaction value had been retained, which, according to Mr Hunter's own rationale, were based on the 55,000 retail merchants: see above at [245]–[248] and [290]–[291]. No explanation has been proffered as to why the 257,400,000 deliveries and $9 billion transaction value figures were retained in the CBA announcement after CBA had told GetSwift that the 55,000 figure was incorrect.

[500] GSW.0019.0001.3677.
[501] GSW.0019.0001.3677.
[502] GSW.0019.0001.3686.
[503] Polites Affidavit (GSW.0009.0019.0001_R) at [111].
[504] GSW.0019.0001.3689 attaching GSW.0019.0001.3692.
[505] GSW.0019.0001.3707 attaching GSW.0019.0001.3709.

357 Mr Budzevski accepted in cross-examination that in the 10:26am email, Mr Hunter was effectively saying that "we are going to release this on the ASX and if anyone has any difficulty you need to tell me".[506] Mr Budzevski also accepted that by 11:15am, knowing that the GetSwift ASX release was to come out on 4 April 2017, he would have read the draft ASX announcement attached to that email.[507] Despite this, Mr Budzevski did not respond to Mr Hunter's email taking issue with the delivery or value figures in the draft ASX release; his explanation being that those figures were GetSwift's numbers.[508] In cross-examination, Mr Budzevski conceded that it was imprudent for him to take that position.[509]

358 It was put to Ms Kitchen in cross-examination that it was her role to obtain approval from CBA for an announcement to the ASX made by GetSwift if it mentioned CBA, to which Ms Kitchen replied "[n]o, I don't think I recall whether it was my responsibility to obtain approval for an external ASX announcement that wasn't CBAs."[510] This is consistent with Ms Kitchen's affidavit evidence, about which she was not cross-examined, that (having noticed that the 55,000 retail merchant figure had been removed from GetSwift's ASX announcement following her request, and that the references to 257,400,000 deliveries and $9 billion remained), "[u]ltimately, because the document was not being released by CBA, I did not consider it appropriate for me to fact check another organisation's ASX announcement and so I did not raise this issue any further.[511]

359 At 10:42am, Mr Polites replied to Ms Kitchen's 10am email, stating, "[t]he latest version of the ASX announcement – sent by Bane – has quotes and the figure removed.[512] At 1:38pm, Ms Kitchen replied to Mr Polites, stating:

> Just passing on some feedback that the business is a little uncomfortable with the naming of other organisations in the release – especially in the context of the pricing mentioned. I have highlighted that this is your announcement and words…but just thought I would pass this on and see if there was anything you might be able to do with this paragraph. However, I do fully respect that it is a GetSwift announcement and

[506] T520.10–521.7 (Day 7).
[507] T522.15–16 (Day 7).
[508] Budzevski Affidavit (GSW.0009.0044.0001_R) at [58]–[59], and [122].
[509] T523.9–12 (Day 7).
[510] T545.8–12 (Day 8).
[511] Kitchen Affidavit (GSW.0009.0043.0001_R) at [92].
[512] 961.001.000884.

appreciate that I am possibly stretching our expectations here."[513]

360 At 2:23pm, Mr Polites replied to Ms Kitchen, stating: "Given the time zones at play, the announcement may already be with the company secretary. But let me ask." At 2:23pm, Mr Polites forwarded this email to Mr Hunter and Mr Macdonald, stating: "One last request from CBA. Again -- I've given you an out if you want it. Natalie's right, it is a bit of over-reach on their part."[514]

361 At 5:27pm, Mr Mison replied to Mr Hunter's previous email at 9:20am, stating "All, please find attached final PDF to be lodged tomorrow (Tuesday 4th April)".[515] Mr Eagle responded to that email with "No comments here".[516]

362 On the following day, the final version of the CBA announcement, was submitted by GetSwift, and was released by the ASX at 8:26am on 4 April 2017, entitled "Commonwealth Bank and GetSwift sign exclusive partnership" (**CBA Announcement**).[517] It was marked as "price sensitive", following Mr Hunter's specific request (copied to Mr Macdonald) that it be marked as such.[518] The CBA Announcement included the following statement: "GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform over the next five years, with an estimated aggregate transaction value of $9 billion."

363 Mr Mison forwarded an email from Ms Kristina Czajkowskyj (Senior Markets Announcement Officer at the ASX) to Mr Hunter and Mr Macdonald that confirmed the CBA Announcement had been submitted. Further, in the original email, Ms Czajkowskyj stated: "Please be reminded we take into account client wishes regarding sensitivity but we retain the final decision on whether or not any announcement is price sensitive".[519]

364 Finally, as to the figures that were included in the final announcement, it is important to set out the relevant affidavit evidence in respect of these figures. Mr Madoc stated that he did not know

[513] 961.001.000884.
[514] GSWASIC00023421.
[515] GSWASIC00023425 attaching GSWASIC00023426.
[516] GSWASIC00023423.
[517] CBA Announcement (GSW.1001.0001.0454); Agreed Background Facts (GSW.0002.0002.0001) at [28].
[518] GSWASIC00030359 attaching GSWASIC00030360; Agreed Background Facts (GSW.0002.0002.0001) at [28].
[519] GSWASIC00023367.

the source of the 257,400,000 and $9 billion figure and had no recollection of discussing these figures with GetSwift. In any event, he noted that these were not matters that he would have knowledge about in the usual course.[520] Similarly, Mr Chambers, Mr Budzevski and Ms Kitchen stated that they did not know the source of the 257,400,000 and $9 billion figure, nor could they recall providing these figures to GetSwift.[521] Ms Gordon also did not know how these figures were calculated, and first heard of them when she received the draft media release from Mr Hunter on 21 February 2017.[522]

Development of the GetSwift App for CBA

365 GetSwift admits that, as at 4 April 2017, an application had not yet been developed, alternatively customised, by GetSwift for deployment on Albert devices.[523] Further, Ms Gordon deposed that "[a]t the time the agreement between GetSwift and the CBA was being negotiated, no testing had been undertaken by the CBA to see whether the GetSwift application would work on the Albert device".[524]

366 Following the release of the CBA Announcement to the ASX, GetSwift (principally via Ms Gordon) worked with representatives of the CBA to develop an application for deployment on Albert devices. The detail of the development work is set out in emails exchanged between Ms Gordon and representatives of CBA during July to November 2017.[525]

367 By 11 October 2017, GetSwift had successfully installed and tested the GetSwift applications on the Albert device,[526] and on or about 16 October 2017, GetSwift submitted the applications based on the new operating system, known as "Lollipop OS" at CBA.[527] On 24 October 2017, CBA informed Ms Gordon that the Lollipop OS was still under review by CBA, with the final version yet to be approved, and once approved, CBA could commence "security/technical

[520] Madoc Affidavit (GSW.0009.0008.0001) at [23].
[521] Chambers Affidavit (GSW.0009.0018.0001_R) at [25]; Budzevski Affidavit (GSW.0009.0044.0001_R) at [58]–[59]; Kitchen Affidavit (GSW.0009.0043.0001_R) at [14].
[522] Gordon Affidavit (GSW.0009.0021.0001_R) at [130], and [153].
[523] GetSwift Defence at [48].
[524] Gordon Affidavit (GSW.0009.0021.0001_R) at [100].
[525] GSWASIC00017404 attaching GSWASIC00017405; GSWASIC00017381; GSWASIC00017382; GSWASIC00006387; GSWASIC00016446; GSWASIC00016459; GSWASIC00061956; GSWASIC00061957; GSWASIC00006340; GSW.0015.0001.0614, and GSWASIC00004806.
[526] T419.10–14 (Day 6).
[527] GSWASIC00055822; GSWASIC00006340.

checks and business reviews" of the GetSwift applications which could take "up to min. 6 weeks".[528] In late October and early November 2017, CBA commenced a technical review of the GetSwift applications. During that review, CBA identified various technical issues that needed to be addressed.[529]

368 On 15 November 2017, Ms Gordon sent an email to Mr Hunter, which stated, "the CBA partnership is running smoothly and in line with the bank's standard processes".[530] Ms Gordon confirmed in cross-examination that was the position in relation to CBA partnership at the time she resigned from GetSwift on 15 November 2017.[531]

369 In mid-November, CBA confirmed that the payment application had passed the technical review,[532] and on 24 November 2017, that the payment application had been approved by the security team and would be uploaded to the appbank the following week.[533] A few weeks later, on 22 December 2017, CBA emailed GetSwift and confirmed that a "successful technical and security review of GetSwift Dispatcher App v.1.0.4 has now been completed, and the app is in a hidden state on Pi App Bank. Once Lollipop is live in the market we can deploy the app as required".[534]

Conduct of CBA after the CBA Announcement

370 On 6 December 2017, Mr Chambers sent an email to Mr Hunter and Mr Macdonald in the following terms:

> … great to see you both and looking forward to continuing our partnership into 2018.
>
> On consistently managing our partnership in the media prior to the security testing on the apps being cleared, we would recommend keeping close to the ASX announcement that you put out in April 2017 (attached).
>
> Paragraphs 2 and 3 are solid phrases that reiterate our partnership and further down there is mention of the Albert platform itself.
>
> Once we are ready to launch in market, the relevant marketing teams will be ready to

[528] GSWASIC00006340.
[529] GSW.0015.0001.0614.
[530] GSWASIC00037209.
[531] T419.46–47 (Day 6).
[532] GSW.0015.0001.1081.
[533] GSWASIC00001549.
[534] GSWASIC00053419.

> support the messaging directly to **our c90k Albert clients**. It is a fantastic solution to a known concern of our business clients around meeting rising customer expectations.[535]

371 The reference by Mr Chambers to the "c90k Albert clients" was consistent with his evidence from his ASIC examination (as described above) and with the evidence of Mr Budzevski that the number of Albert terminals were steadily increasing from about 2015 onwards.[536]

372 Mr Budzevski, in response to questions from the Court, considered that it would be vital for figures in a document going to the ASX relating to a partnership with CBA to be correct, and agreed that he became aware that at or around the time of the announcement the figures contained in the release were published to the market, but could not recall what action was taken.[537] There is no evidence that any corrective action was ever taken by CBA from the ASX announcement being made on 4 April 2017.

373 On 18 December 2017, GetSwift submitted to the ASX and the ASX released an announcement entitled "CBA and GetSwift Update",[538] which provided the market with an update on the partnership, including that:

> - CBA will begin deploying the GetSwift platform as part of the new Albert operating system rollout. Although a deployment under the old CBA Albert operating systems was considered to speed up market deployment by a few months, strategically the bundling of the GetSwift service with the new Albert operating system was the preferred choice and agreed by both organisations.
> - Approximately 90,000 merchants will receive the new operating system with the GetSwift platform with go to market live rollouts planned from Feb 2018 onwards.
> - The company expects to see revenues from the market utilization to start manifesting in mid-2018.

GetSwift responses to the projections queries in the ASX aware letters

374 On 22 January 2018, GetSwift received an Aware Query from ASX (**First Aware Query**) in relation to a number of announcements.[539] As to CBA, the ASX asked GetSwift to respond to the following questions:

[535] GSWASIC00003990 (emphasis added).
[536] T489.28–32 (Day 7).
[537] T523.41–524.7 (Day 7).
[538] GSW.1001.0001.0342.
[539] GSW.1001.0001.0054 at 0059–0065.

(1) Does GetSwift consider the information in the CBA Announcement to be information that a reasonable person would expect to have a material effect on the price or value of its securities and the basis for that view?

(2) Was the contract with CBA subject to any initial development period and/or pilot testing trial period; how long is the period and when did it or will it commence, and why was this information was not disclosed in the CBA Announcement?

(3) Has CBA agreed to adopt the GetSwift Application?

(4) Explain the basis GetSwift expects to see revenues from the market utilisation to start manifesting in mid-2018, and that the CBA deal is estimated to result in over 257,400,000 deliveries on its platform over the next five years, with an estimated aggregate transaction value of $9 billion.[540]

375 On 26 January 2018, Mr Macdonald sent an email to Mr Samer Kiki and Mr Hunter, attaching a draft response to the First Aware Query and advising that the draft had "[n]ot reviewed by lawyers yet … Please assemble crisis team … Let's go after fairfax".[541] The attached document provides the following proposed explanation to the ASX as to how the 257,400,000 and $9 billion figures were calculated:

> 257m over 5 years = divided by 5
>
> divided by the amount of devices 88,000 devices
>
> = 584 deliveries per year per device
>
> = 48 per month
>
> = 1.6 deliveries per day
>
> Our experience is that is a conservative market estimate.[542]

376 The draft response prepared by Mr Macdonald is significant in at least three respects. *First*, there is no suggestion in the draft response to the First Aware Query (or the response to the Second Aware Query below) that the figures were provided by or approved by CBA.

[540] GSW.1001.0001.0054 at 0063.
[541] GSWASIC00001789 attaching GSWASIC00053500.
[542] GSWASIC00053500.

377 *Secondly*, the explanation is inconsistent with the "rationale" which Mr Hunter had provided to Mr Polites on 24 February 2017 (as described above at [245]–[248]),[543] and which Mr Hunter had provided, via Mr Polites, to CBA on 10 March 2017 (also described above at [290]–[291]).[544] This is because the explanation seeks to reverse engineer the projections by reference to a purported number of Albert devices (88,000 devices), rather than the number of "retail merchants" (55,000 retail merchants).

378 *Thirdly*, there is no evidence that Mr Hunter or Mr Macdonald had, at any time before making the 4 April 2017 announcement, inquired or ascertained the number of Albert devices in circulation.

379 On 6 February 2018, GetSwift received a further aware query from the ASX (**Second Aware Query**). The Second Aware Query asked a series of questions including, among others, that GetSwift "explain the basis for the statement in the CBA Announcement that it expected the CBA deal to result in over 257,400,000 deliveries on its platform over the next five years, with an estimate aggregate transaction value of $9 billion, and why that statement was not subject to a qualification that CBA had not yet agreed to adopt the [GetSwift] platform".[545]

380 GetSwift's response to the Second Aware Query is dated 9 February 2018, and included the following statement in relation to CBA: "The estimated volumes were based on number of total devices and expected average transaction per device."[546] This response is again inconsistent with the "rationale" which Mr Hunter had shared on 24 February 2017 and 10 March 2017 by referring to the total number of devices rather than the number of retail merchants.

Mr Begbie's email

381 On 1 February 2018, Mr Begbie sent an email to numerous recipients, including Mr Hunter, Mr Macdonald, and employees of PwC Australia, which stated:

> We can confirm CBA is agreeable to the following statement: CBA did not give permission to GetSwift to release to the market the ASX update made on 18 December 2017. Only the initial announcement on made on [*sic*] 4th April 2017 was approved by

[543] GSW.0019.0001.2769.
[544] GSWASIC00047029; 961.001.000436.
[545] GSW.1000.0001.0065.
[546] GSW.1019.0002.0054 at 0055.

CBA. …"[547]

382 It is important to note however that GetSwift did not require Mr Begbie for cross-examination and did not ask him about this email. Mr Begbie stated in his affidavit that he had no involvement in the CBA Agreement and did not see the CBA Announcement before it was released to the ASX.[548]

G.1.3 *Pizza Pan Group Pty Ltd*

383 As at early 2017, Pizza Pan Group Pty Ltd (**Pizza Pan**) was the master franchisee for approximately 300 Pizza Hut franchise stores in Australia.[549] In 2017, Pizza Pan Equity Group Pty Ltd (**Pizza Pan Equity**) owned and operated approximately eight Pizza Hut franchise stores (or restaurants) in Australia (**Equity Stores**).[550] Out of the Box Group Pty Ltd is the parent company of Pizza Pan, Pizza Pan Equity, Pizza Pan FCD Pty Ltd (**Pizza Pan FCD**) and Out of The Box Technology Pty Ltd (**Out of the Box Technology**) (together, **Out of the Box Group**).[551] None of the Out the Box Group companies are subsidiaries of Yum! Brands, Inc (which is another Enterprise Client, dealt with below).[552] The companies in the Out of the Box Group did not own or operate any Pizza Hut franchise stores or delivery units outside of Australia.[553]

384 Pizza Hut franchisees all operate the same "point of sale" system (**Point of Sale System**). Only companies licensed through Oracle are permitted to modify the Point of Sale System. As at early 2017, the Out of the Box Group used an Oracle-licensed company called "CodeVision" to modify its Point of Sale System in Australia.[554]

[547] GSWASIC00001068.
[548] Begbie Affidavit (GSW.0009.0015.0001) at [20]–[21].
[549] Affidavit of Patrick David Branley sworn 4 October 2019 (**Branley Affidavit**) (GSW.0009.0033.0001_R) at [13]; T581.4–7 (Day 8).
[550] Branley Affidavit (GSW.0009.0033.0001_R) at [12].
[551] Branley Affidavit (GSW.0009.0033.0001_R) at [8]; T574.1–3 (Day 8); GSW.0003.0001.0182; GSW.0003.0001.0567.
[552] Branley Affidavit (GSW.0009.0033.0001_R) at [8].
[553] GSW.0003.0001.0182; GSW.0003.0001.0567; GSW.0003.0001.0548; GSW.0003.0001.0553; GSW.0003.0001.0558; GSW.0003.0001.0577. See also Branley Affidavit (GSW.0009.0033.0001_R) at [12], and [15]).
[554] Branley Affidavit (GSW.0009.0033.0001_R) at [21].

385 Mr Patrick Branley, the Head of Technology Enablement at Pizza Pan, commenced his role on 10 April 2017,[555] and during 2017, reported to Mr Ollie Coupe, Director of Technology at Pizza Pan.

GPS Delivery Tracking Project and the Pizza Hut Test Store Site

386 Between about 10 April 2017 and about May 2018, Mr Branley was responsible for overseeing the delivery of all technology projects across the Out of the Box Group pursuant to the 'Program of Works' (a term which appears to mean a work stream or something of the like). This included managing the delivery of each of the projects within the Program of Works and managing the individual project managers who had day-to-day responsibilities for the delivery of each of their respective projects. One of the IT projects within the Program of Works was a GPS Delivery Tracking project. As part of the GPS Delivery Tracking project, Pizza Pan sought to identify a supplier of delivery tracking and management software solutions.[556]

387 Since late 2016, Pizza Pan had used the Equity Store located in Bonnyrigg, New South Wales, as a test store to trial proposed new IT systems, software solutions and processes as part of the Program of Works (**Pizza Hut Test Store**). Pursuant to the Program of Works, if the trial of any proposed new IT system, software solution or process was successful, it may then be rolled out to the other Equity Stores, and then offered to Pizza Hut franchisees across Australia, as an option to take up or use in their stores.[557]

388 In or around mid-March to early April 2017, Mr Branley was told by Mr Coupe that Pizza Pan had sought a supplier of delivery tracking and management software solutions, initially to support its Equity Stores and then to offer the solution to its franchisees.[558]

Pizza Pan's entry into an agreement with GetSwift

389 In November 2016, GetSwift and Pizza Pan were negotiating an agreement whereby GetSwift would provide Pizza Pan with a software platform with logistics management, tracking,

[555] T574.19–44 (Day 8) Branley Affidavit (GSW.0009.0033.0001_R) at [8].
[556] Branley Affidavit (GSW.0009.0033.0001_R) at [17]–[18].
[557] Branley Affidavit (GSW.0009.0033.0001_R) at [19]–[20].
[558] Branley Affidavit (GSW.0009.0033.0001_R) at [26(a)].

dispatch, route and reporting of delivery operations, including provision of SMS alerts, related reports and system data dumps.[559]

390 In about December 2016, Pizza Pan conducted a "proof of concept" trial involving GetSwift, Delivery Command, and Drive Yellow, each of which offered GPS delivery tracking software solutions at Pizza Pan's Test Store (**December 2016 Proof of Concept Trial**).[560] To facilitate the December 2016 Proof of Concept Trial, Pizza Pan engaged CodeVision to prepare a basic integration of the GetSwift software into the Point of Sale System operated by the Pizza Hut Test Store.[561]

391 The minutes of the board of directors of GetSwift on 9 December 2016, attended by Mr Hunter, Mr Macdonald, Ms Gordon and Mr Eagle, state that:

> 1.1 Two announcements are expected in addition to what we have now:
>
> - Phillip Morris
>
> - Pizza Hut […][562]

392 The minutes do not record any further discussion of Pizza Hut.

393 On 6 February 2017, Pizza Pan invited proposals for the supply of the GPS tracking and management to Pizza Pan and its franchisees (**Request for Proposal**).[563] The Request for Proposal was headed "PIZZA HUT Request for Proposal" and stated "Pizza Hut Australia" is seeking a supplier of delivery tracking and management services to support the business through system roll out for a minimum period of one year.[564] This is consistent with the fact that Pizza Pan employees, from time to time, referred to Pizza Pan as Pizza Hut.[565] As at 2017, the Pizza Hut Australia webpage, for which Mr Branley was responsible, displayed the Pizza Hut logo.[566]

[559] GSWASIC00065850 attaching GSWASIC00065887.
[560] T575.30–35 (Day 8); Branley Affidavit (GSW.0009.0033.0001_R) at [26(b)].
[561] Branley Affidavit (GSW.0009.0033.0001_R) at [26(c)]; T575.6–35 (Day 8).
[562] GSWASIC00065793.
[563] GSW.1020.0001.2303; Branley Affidavit (GSW.0009.0033.0001_R) at [26(d)].
[564] GSW.1020.0001.2303; T576.24–44 (Day 8).
[565] T583.9–10 (Day 8).
[566] T583.43–44 (Day 8).

394 On 14 February 2017, Mr Macdonald sent an email to Mr Taylor of Pizza Pan and others submitting GetSwift's response to Pizza Pan's Request for Proposal.[567] Mr Macdonald signed GetSwift's response on behalf of GetSwift.[568] One of the documents attached to Mr Macdonald's email, entitled "GetSwift Pizza Hut Australia On-Boarding", referred to Pizza Hut and bore the Pizza Hut logo.[569]

395 Pizza Pan had received another two tender responses from other suppliers of delivery tracking and management[570] and, after identified three companies to progress to a trial, being GetSwift, Delivery Command and Drive Yellow.[571]

396 In around March 2017, Mr Coupe asked Mr Branley to participate in a Google hang-out teleconference with Mr Hunter and Mr Macdonald. In the teleconference, Mr Hunter and Mr Macdonald gave an overview of the GetSwift delivery tracking software system and explained what the product was about.[572]

397 On 24 March 2017, Mr Branley sent an email to Mr Macdonald requesting information about GetSwift's technical documentation on their product and "anything related to the [Proof of Concept]".[573] On the same date, Mr Macdonald sent an email to Mr Branley (copied to Mr Tim Howard of Allegro Funds), containing a link to GetSwift's technical documentation.[574] In this email, Mr Macdonald stated:

> Regarding POC info, could you please quantify what exactly you would like to see as we have sent out a bunch of info already so want to make sure we don't data dump you.[575]

398 On 28 March 2017, Mr Macdonald sent an email to Mr Coupe attaching a document entitled "Term Sheet" that Mr Macdonald noted had previously been sent to Mr Howard.[576] At this

[567] GSW.1020.0001.0220 attaching GSW.1020.0001.0221, and GSW.1020.0001.0285.
[568] GSW.1020.0001.0285 at 0300.
[569] GSW.1020.0001.0221 at 0225.
[570] Branley Affidavit (GSW.0009.0033.0001_R) at [26(f)].
[571] Branley Affidavit (GSW.0009.0033.0001_R) at [27].
[572] Branley Affidavit (GSW.0009.0033.0001_R) at [22]; GSWASIC00046599; GSWASIC00024061.
[573] GSWASIC00024061.
[574] GSWASIC00024061.
[575] GSWASIC00024061.
[576] GSW.1020.0001.0199 attaching GSW.1020.0001.0200.

time, the proposed agreement between GetSwift and Pizza Pan contemplated that GetSwift would provide services to Pizza Pan "within Australia".[577]

399 On 31 March 2017, Mr Macdonald sent an email to Mr Coupe (copied to Mr Howard and Mr Branley), attaching the proposed high level implementation plan for the engagement between GetSwift and Pizza Pan.[578] Mr Macdonald noted that the timelines proposed in the implementation plan were reliant on an agreement being executed in the following week.[579]

400 At some point in March or early April 2017, Mr Branley recommended to Mr Coupe that Pizza Pan should proceed to trial with GetSwift, and Mr Coupe accepted his recommendation.[580] Mr Branley's view was that in order for Pizza Pan to be able to test the functionality of GetSwift system software with the Pizza Pan software, what was first required was the technical integration of GetSwift's systems into Pizza Pan's Point of Sale. Further, Mr Branley and Mr Coupe shared the view that fair testing was contingent on the two systems being integrated.[581] Therefore, Mr Coupe agreed that Pizza Pan would pay the costs associated with integration.[582]

401 While there are references in this context to progressing to "trial", it is clear that this was not a trial in the usual sense. As noted above, GetSwift had already participated in and been subject to the December 2016 Proof of Concept Trial. This was a trial as the first stage of a broader roll-out. In this regard, Mr Branley agreed to the following in cross-examination:

> [S]hortly after you first heard of this project you were involved in making certain recommendations as to who of the people who had responded to the RFP should be selected to support Pizza Hut Australia through a system rollout for a minimum period of one year; is that right? --- Yes.
>
> And at that point you made a recommendation to Mr Coupe in a conversation with him that Pizza Pan should progress to a trial with GetSwift. Do you see that? --- Yes, I do.
>
> And the trial was to be, wasn't it, to support the business through system rollout for a minimum period of one year, do you agree? --- Would I agree with that, yes.
>
> And so when you say that you recommended they progress to a trial, it was quite a different kind of trial, wasn't it, than the proof of concept trial which had already been

[577] GSW.1020.0001.0200.
[578] GSW.1020.0001.0185 attaching GSW.1020.0001.0186.
[579] GSW.1020.0001.0185.
[580] Branley Affidavit (GSW.0009.0033.0001_R) at [28].
[581] Branley Affidavit (GSW.0009.0033.0001_R) at [30].
[582] Branley Affidavit (GSW.0009.0033.0001_R) at [30].

gone through? --- Yes. Yes, it would be different.

…

And so the anticipation was that once someone had been selected then there would be an execution of an agreement and that agreement would be for a minimum period of one year, do you agree? --- Yes.[583]

402 On 2 April 2017, Mr Coupe sent an email to Mr Branley, Mr Macdonald, Mr Adam Pretorius of Pizza Pan, and Mr Nathan Tillett of Pizza Pan in relation to the GPS Delivery Tracking Project.[584] Mr Coupe requested Mr Tillett contact Mr Macdonald directly to discuss the Key Performance Indicators (**KPIs**), the location of the equity stores, and other details relating to the pilot.[585]

403 On 4 April 2017, Mr Macdonald sent an email to Mr Coupe following up the execution of an agreement, and resent Mr Coupe the term sheet that he sent on 28 March 2017.[586] In an exchange of emails on the same day, Mr Coupe requested GetSwift's customary terms and conditions, which Mr Macdonald then provided to him.[587]

404 On 18 April 2017, Mr Coupe sent an email to Mr Macdonald, copied to Mr Branley, Ms Wong and Ms Sue Fairbairn (both employees of Pizza Pan), attaching a marked up version of the draft term sheet.[588] On the same date, Mr Macdonald sent an email to Mr Eagle and Mr Hunter forwarding Mr Coupe's email attaching the marked up version of the draft term sheet.[589] In this email, Mr Macdonald stated:

Gents,

Great news. After much perseverance, we have been able to pull this one off and PizzaHut want to sign on as a client!!!

Passing the term sheet pdf on. Here are their comments in black (mine in red) they have raised [in relation to the term sheet].[590]

[583] T577.1–15 (Day 8); T577.25–27 (Day 8).
[584] GSWASIC00064299 at 4304.
[585] GSWASIC00064299 at 4304.
[586] GSWASIC00064299 at 4303 attaching GSW.1020.0001.0200.
[587] GSWASIC00064299 at 4301–4303.
[588] GSWASIC00064299 at 4300 attaching GSWASIC00022485.
[589] GSWASIC00064299.
[590] GSWASIC00064299.

405 In that email, Mr Macdonald also instructed Mr Eagle to consider certain comments and contractual issues as specifically identified by Mr Macdonald.[591] There was then a subsequent exchange of correspondence between Mr Eagle and Mr Macdonald (copied to Mr Hunter), which has been redacted and is subject to a claim for legal professional privilege.[592]

406 On 19 April 2017, Mr Eagle made amendments to the draft term sheet in mark up.[593] Mr Macdonald subsequently sent an email to Mr Coupe (copied to Mr Branley, Ms Wong, Ms Fairbairn, Mr Hunter and Mr Eagle), attaching a further draft of the term sheet with GetSwift's changes appearing in mark up.[594] Mr Macdonald provided the comments of the GetSwift "team" in the body of the email.[595]

407 On 20 April 2017, Mr Macdonald sent an email to Mr Coupe (copied to Mr Eagle, Mr Hunter, Mr Branley, Ms Wong and Ms Fairbairn), attaching an executed copy of the "Term Sheet".[596] The term sheet was signed by Mr Macdonald on behalf of GetSwift.

408 On 21 April 2017, Mr Coupe sent an email to Mr Macdonald (copied to Mr Hunter and Mr Eagle), attaching an executed counterpart of the "signature page" of the term sheet (**Pizza Pan Agreement**).[597] The Pizza Pan Agreement was signed by Lisa Ranson, "CEO/Director" of the Pizza Pan Group.

409 As to the services to be provided, the Pizza Pan Agreement provided in item 3:

> Client exclusively engages GetSwift to provide the following services (the "Services") and GetSwift accepts such engagement:
>
> - Use of GetSwift's proprietary software platform to provide Client with logistics management, tracking, dispatch, route and reporting of delivery operations, including provision of SMS alerts, related reports and system data dumps; and
>
> - Consultancy advice and product development in relation to the Services in a reasonable number of meetings and working sessions mutually agreed upon
>
> GetSwift will use commercially reasonable efforts to provide the Services within

[591] GSWASIC00064299.
[592] GSWASIC00071012_R.
[593] GSWASIC00022464.
[594] GSWASIC00064290 attaching GSWASIC00022456.
[595] GSWASIC00064290.
[596] GSWASIC00066118 attaching Pizza Pan Agreement (GSWASIC00059963).
[597] GSWASIC00022222 attaching GSWASIC00022234.

> Australia. Upon reasonable request, Client must provide GetSwift with such information, documentation, materials, content, and access to personnel GetSwift deems necessary for GetSwift's provision of the Services.[598]

410 As to the term, the Pizza Pan Agreement provided in item 4:

> 12 months + option to renew at same terms 12 months + 12 months (comprised of a limited roll out plus the initial term), as follows:
>
> - Joint Product & Production roadmap implementation: To start on or about May 2nd 2017
> - Proposed Limited Initial Roll Out - One city - Phase 1: 15-25 stores; Phase 2: Single State with Multiple stores Phase 3: Multi State & Multi Stores; Phase 4: Commencement of full national rollout.
> - Initial Term – 12 months pricing guarantee (following the limited roll out and no charge for platform use during initial 3 month time period). Platform use fee rates to start no later than August 1st 2017 and valid until August 1st 2019. Platform use from August 2017 will be charged at the below rates.
> - Client has option to renew for an additional 12 months plus another +12 months after initial and each 12 month term expires. Original price as per tier below plus AUDS0.02 per delivery to be applied. If client does more than 300,000 deliveries per month, then no fee increase will apply for the contract extension.[599]

411 Otherwise, the Pizza Pan Agreement incorporated the standard terms in Schedule 1, which as to the term provided (in cl 1):

> Trial Period and Initial Term. From the date of signing of the Term Sheet to which this Schedule 1 is attached ("Agreement"), GetSwift will provide the Client with a Trial Period set out in Item 4 of the term sheet. Upon expiration of the Trial Period, this Agreement will automatically renew for the Initial Term set out Item 4 of the term sheet.
>
> Renewal Terms. Upon expiration of the Initial Term, this Agreement will automatically renew for successive twelve (12) month periods (each, a "Renewal Term") unless either notifies the other party in writing of its intent not to renew this Agreement at least ninety (90) days prior to the expiration of the Initial Term or then-current Renewal Term, as applicable. Any such Renewal Term will be on the terms and conditions of this Agreement unless otherwise agreed in writing.[600]

412 Mr Branley understood during the first three months there would be no charge during the initial limited rollout, but that the agreement would continue in any event for 12 month, and so far as

[598] Pizza Pan Agreement (GSWASIC00059963) (emphasis omitted).
[599] Pizza Pan Agreement (GSWASIC00059963) (emphasis omitted).
[600] Pizza Pan Agreement (GSWASIC00059963) at 9964 (emphasis omitted).

he understood it, Pizza Pan did not have any option whether to proceed for the full 12-month period.[601]

The Pizza Hut Announcement

413 On 21 April 2017, Mr Hunter sent an email to Ms Hughan and Mr Polites (copied to Mr Macdonald), in which he stated:

> We just landed an exclusive contract for Pizza Hut and Eagle Boys in Australia. We will release this info to the market at the end of the month along with the 4C. Another clear example of what is the emerging dominance of GetSwift in the market.[602]

414 On 22 April 2017, Mr Macdonald sent an email to Mr Coupe, copied to Mr Branley, Ms Wong, Ms Fairbairn, Mr Hunter, Mr Eagle and Ms Gordon, in which he stated:

> We are very pleased to be officially working with PPG on this initiative … Please note that as part of our regular compliance requirements we will have to notify the ASX that we have signed our agreement and are proceeding jointly towards implementation. At a later date if you wish to leverage any PR (like QSRH & Red Rooster have done so effectively with us), we are more than happy to facilitate that and make it part of our market messaging dialogue.[603]

415 On the same date, Mr Coupe responded, copied to Mr Hunter, Mr Eagle and Mr Branley and others, in the following terms:

> I think we'll keep the PR for when we're through the trial and getting set up with the customer facing side of the application. We'll probably start adding messaging into our standard marketing and at that time we can be confident of the value to the business – will be more than happy to get a joint press release going at that time.[604]

416 On the same date, Mr Hunter sent an email to Mr Macdonald attaching a draft announcement concerning GetSwift's entry into the Pizza Pan Agreement.[605] In his covering email, Mr Hunter wrote "take a look and let me know".[606]

417 On 23 April 2017, Mr Hunter sent an email to Mr Macdonald attaching a draft of the Appendix 4C, which stated, among other things:

> Additional global client onboarding taking place concurrently to utilise GetSwift's

[601] T578.23–26 (Day 8); T579.14–18 (Day 8).
[602] GSWASIC00022204.
[603] GSWASIC00051648.
[604] GSWASIC00051648.
[605] GSWASIC00022158 attaching GSWASIC00022159.
[606] GSWASIC00022158.

> SaaS solution to optimise delivery logistics – United States, Canada, Spain, the UK are markets where the company is poised to increase operational deliveries now that integrations and client testing is being finalized. A fraction of first strategic seeds are Pizza Hut, CrossTown Doughnuts, Mobi2Go, and LoneStar to just [*sic*] name a few.[607]

418 On the same date, Mr Macdonald sent an email to Mr Hunter, Mr Eagle and Ms Gordon attaching a draft of the Pizza Hut Announcement, in which he stated, "for your review".[608]

419 On 24 April 2017, responding to Mr Macdonald's email, Mr Eagle sent an email to Mr Hunter, Mr Macdonald, and Ms Gordon, stating: "Only comment my side – we should take out 'multiyear'", and amend a typographical error in paragraph 4 of the proposed announcement.[609]

420 Later that day, Mr Polites sent an email to Mr Hunter (copied to Ms Hughan and Mr Macdonald), regarding the announcement concerning GetSwift's entry into the Pizza Pan Agreement.[610] In this email, Mr Polites stated:

> Quick one regarding your ASX announcement later this week on Pizza Hut and Eagle Boys. Are you doing this as a separate announcement? Or as part of your 4C? If it's a separate announcement, can we see a draft beforehand?[611]

421 Mr Hunter replied suggesting that GetSwift will release the Pizza Hut Announcement separately from the Appendix 4C later that week, but that the Appendix 4C will also refer to the Pizza Hut Announcement.[612]

422 On 25 April 2017, Ms Hughan replied to Mr Hunter's email and stated:

> Given the traction you have had with the other ASX announcements on your deals and the resulting bump you have seen in share price, it is likely that your news may be picked up by the investor press.[613]

423 Also on 25 April 2017, Mr Hunter sent an email to Mr Eagle, Mr Macdonald and Ms Gordon in which he stated that he wanted the Appendix 4C, the Pizza Hut Announcement and the ESOP grants announced that week, with the Pizza Hut Announcement to go out at the same time as

[607] GSWASIC00022114 attaching GSWASIC00022115.
[608] GSWASIC00030300 attaching GSWASIC00030301.
[609] GSWASIC00067806_UR.
[610] GSWASIC00022066.
[611] GSWASIC00022066.
[612] GSWASIC00022066.
[613] GSWASIC00021791.

the Appendix 4C. Mr Hunter stated in his email that the company will have more announcements, "probably one every week or 10 days for the next 60 days".[614]

424 Later that day, Mr Hunter responded to Ms Hughan's email of 25 April 2017, stating "just being sensitive to the client who doesn't want to do a PR push now, but a more coordinated one later".[615] Ms Hughan responded that she would "keep an eye out for share price news across the day but won't proactively pitch anything".[616]

425 On 27 April 2017, Mr Macdonald sent an email to Mr Hunter in which he requested that he merge Mr Eagle's comments that he agreed with into the "live 4C doc".[617] Mr Eagle's comments on the proposed Appendix 4C are redacted and subject to a claim for legal professional privilege by GetSwift.

426 On the morning of 28 April 2017, Mr Hunter sent an email to Mr Macdonald and Mr Eagle attaching the draft announcement concerning GetSwift's entry into the Pizza Pan Agreement.[618] In this email, Mr Hunter stated, "Together with 4c . Lets [*sic*] make sure that Scott puts in in [*sic*] at the same time and in the right template".[619] At 12:44pm, Mr Hunter sent an email to Mr Eagle and Mr Macdonald attaching three documents described as "ASX-GSW- PizzaHut.docx", "GSW_4C_QuarterlyReview_Draft_20 April 2017 (1).docx", "ASX- GSW –ESOP.docx". In the email, Mr Hunter asked Mr Eagle and Mr Macdonald, "You ok to release this now?"[620] At 12:57pm, Mr Hunter sent a further email, this one with the subject line "[f]or release", to Mr Eagle and Mr Macdonald attached the draft announcement concerning GetSwift's entry into the Pizza Pan Agreement, the draft Appendix 4C and the draft ESOP Announcement.[621] At 1:06 pm, Mr Macdonald sent an email to Mr Mison (copied to Mr Eagle, Mr Hunter and Ms Gordon), in which he requested that Mr Mison release the attached documents to the ASX "asap" and further requested that Mr Mison keep the Pizza Hut

[614] GSWASIC00021780.
[615] GSWASIC00021791.
[616] GSWASIC00021791.
[617] GSWASIC00031936_R.
[618] GSWASIC00030273 attaching GSWASIC00059944.
[619] GSWASIC00030273.
[620] GSWASIC00031933_R.
[621] GSWASIC00031191 attaching GSWASIC00021484, and GSWASIC00021486.

announcement separate from the Appendix 4C and the ESOP announcement.[622] His email did not instruct Mr Mison to ask the ASX to mark the Pizza Hut Announcement as price sensitive.

427 At 1:21pm, GetSwift submitted, and at 1:26pm the ASX released, GetSwift's Appendix 4C and Quarterly Review, in which it stated that:

> Transformative and game changing partnerships are expected and will be announced only when they are secure, quantifiable and measurable
>
> ...
>
> The company will not report on MOUs only on executed contracts.
>
> …
>
> Even though this may represent a challenge for some clients that may wish in some cases not publicize [*sic*] the awarded contract, fundamentally the company will stand behind this policy of quantifiable non hype driven announcements even if it results in negative short term perceptions.[623]

428 The form of announcement attached to Mr Macdonald's email did not make the correction requested by Mr Eagle (removal of "multiyear").[624] That fact was, presumably, not picked up by Mr Hunter, Mr Eagle or Ms Gordon, all of whom were copied to Mr Macdonald's email directing release of the announcement.

429 At 1:25pm, GetSwift submitted, and at 1:28pm the ASX released, the announcement concerning GetSwift's entry into the Pizza Pan Agreement, entitled "Pizza Hut and GetSwift sign exclusive partnership" (**Pizza Hut Announcement**).[625] The Pizza Hut Announcement was marked "price sensitive" upon release to the market by the ASX.[626] Pausing briefly here, I should say that I have defined this announcement a little differently to the other announcements in this narrative. The announcement in respect of Pizza Pan is defined as the Pizza Hut Announcement. It is not the Pizza Pan Announcement, which was sometimes referred to (somewhat inconsistently) by GetSwift, Mr Macdonald and Mr Eagle in their closing submissions, despite these defendants having adopted the term Pizza Hut Announcement too.

[622] GSWASIC00021471 attaching GSWASIC00021474, and GSWASIC00021476.
[623] April 2017 Appendix 4C (GSW.1001.0001.0459); Agreed Background Facts (GSW.0002.0002.0001) at [14]–[15].
[624] GSWASIC00021474.
[625] Pizza Hut Announcement (GSW.1001.0001.0470); Agreed Background Facts (GSW.0002.0002.0001) at [34].
[626] Pizza Hut Announcement (GSW.1001.0001.0470); Agreed Background Facts (GSW.0002.0002.0001) at [34].

The reason why I refer to this particular announcement as the Pizza Hut Announcement will become evident below (at Part H).

430 At 1:51pm, Mr Mison sent an email to Mr Eagle, Mr Hunter, Mr Macdonald and Ms Gordon confirming that the Pizza Hut Announcement had been released to the ASX at 1:28pm.[627]

431 The Pizza Hut Announcement stated:

> GetSwift Limited (ASX: GSW) ('GetSwift' or the 'Company'), the SaaS solution company that optimises delivery logistics **world-wide**, is pleased to announce that it has signed an exclusive multiyear partnership with Pizza Hut. Pizza Hut is the largest pizza chain **in the world** with more than 12,000 Pizza Hut Restaurants and Delivery Units operating **worldwide**.
>
> Pizza Hut is an American restaurant chain and **international** franchise. The company has over 15,000 locations **worldwide** as of 2015, and is a subsidiary of Yum! Brands, Inc., one of the **world's** largest restaurant companies.
>
> Yum! Brands, Inc., or Yum! and formerly Tricon Global Restaurants, Inc., is a Fortune 500 corporation, Yum operates the brands Taco Bell, KFC, Pizza Hut, and WingStreet **worldwide**.
>
> It is one of the **world's** largest fast food restaurant companies in terms of system units— with 42,692 restaurants (including 8,927 that are company-owned, 796 that are unconsolidated affiliates, 30,930 that are franchised, and 2,039 that are licensed) around the world in over 130 countries
>
> Home delivery is a fast growing segment of the pizza market worldwide, and Pizza Hut delivery has been at the forefront of this segment since 1985. In order to compete aggressively in this market **Pizza Hut has partnered with GetSwift to offer its retail stores in Australia** the ability to compete with their global counterparts when it comes to deliveries and logistics. **Approximately 270 Pizza Hutt and another 50 Eagle Boys stores are located in Australia.**
>
> The exclusive partnership will allow Pizza Hut the ability to use the best in class logistics platform in order to continue improving the customer experience, reduce operational inefficiencies and expand market share.
>
> "We are extremely pleased to be partnering with one of what is indisputably a global icon. With a clear vision, plan and ability to execute there is no doubt of the impact that will be created" Executive Chairman of GetSwift, Bane Hunter said.[628]

432 It is important to foreshadow that the bolded emphasised parts above form part of a dispute between the parties as to what was generally available to the market. I will return to this issue below: see [1382]–[1391].

[627] GSWASIC00045747 attaching GSWASIC00045748.
[628] GSWASIC00021780 (emphasis altered).

Pizza Pan is not part of Pizza Hut International

433 On 28 April 2017, Mr Nobel Kuppusamy of Pizza Hut International sent an email to "info@getswift" and "james@getswift.co" in which Mr Kuppusamy stated:

> I am with Pizza Hut International that is part of Yum! Brands Inc. I would like to understand your capabilities, and see how you can help us address our specific use cases. Can someone from your sales team reach out to me please? Thanks Nobel.[629]

434 On 29 April 2017, Ms Cox replied to Mr Kuppusamy's email stating:

> How can we help you? Which specific use case would you like to address? What capabilities do you want and need? Where are you based pls? Could you please advise us of your phone number? What's you role at Pizza Hut International pls?

435 Ms Cox forwarded Mr Kuppusamy's email to (it appears) Mr Macdonald, and stated, "OK, why is this guy from 'Pizza Hut International' wanting to know about GetSwift when you've signed a deal with them? Is this normal? or Weird?"[630] On the same date, Mr Macdonald responded to Ms Cox, copied to Mr Hunter, stating:

> We signed with Pizza Hut in Australia. This guy is from yum brands the global company which owns the Pizza Hut brand, Taco Bell and KFC. When he replies please then make the intro to Bane and myself and we will take it from there.[631]

436 On 4 May 2017, Mr Macdonald sent an email to Mr Eagle (copied to Mr Hunter), forwarding a chain of emails passing between Mr Macdonald and representatives of Pizza Hut International (as opposed to Pizza Pan), in which, among other things, Mr Kuppusamy stated "I am with Pizza Hut International that is part of Yum! Brands Inc."[632]

Pilot postponed

437 As alluded to above, as part of the "Joint Product & Production roadmap implementation", GetSwift's software had to be integrated into Pizza Pan's Point of Sale System. This had not occurred at the time of the Pizza Hut Announcement because Pizza Pan had not yet engaged CodeVision to carry out that work.[633]

[629] GSWASIC00021304 at 1305–1306.
[630] GSWASIC00021304 at 1305.
[631] GSWASIC00021304 at 1305.
[632] GSWASIC00031925_R.
[633] Branley Affidavit (GSW.0009.0033.0001_R) at [41].

438 Between 24 and 28 July 2017, Mr Hunter, Mr Coupe, Ms Wong and Ms Gordon exchanged a number of emails regarding the proposed trial of the GetSwift Platform.[634] This included negotiations in relation to the scope of the proposed trial and costs associated with providing the drivers with mobile devices and the impact of ongoing projects being undertaken by Pizza Pan.

439 On 31 July 2017, Mr Coupe (on Mr Branley's recommendation) sent an email to Mr Hunter in which he stated that he had made the call to pause all programmes other than the website upgrade until further notice.[635] He stated that it is likely that the GPS tracking pilot roll-out will re-start in August or early September.[636] Mr Branley recommended Mr Coupe place the GetSwift GPS pilot roll-out on hold pending completion of Pizza Pan's website project for Pizza Hut Australia.[637] Mr Hunter responded to Mr Coupe's email on 1 August 2017, copied to Ms Wong, Ms Gordon, Mr Clothier, Mr Branley, Mr Nick Stevens and Ms Cox, stating, "if I may suggest we revisit this as you indicated in two weeks to see if we should make the initial batch of phones ready for you".[638] Mr Coupe responded in the email chain and agreed to keep the communication lines open between Mr Hunter and himself.[639] An internal GetSwift status email sent to Mr Hunter and Mr Macdonald reveals that as at 4 August 2017, the relevant work was done in relation to the project from GetSwift's end, but there were client delays.[640]

440 On 18 August 2017, Mr Hunter sent an email to Mr Coupe, Ms Wong, Mr Macdonald and other personnel from GetSwift in which he stated that there had been a recent executive decision made between Mr Coupe and Mr Hunter concerning the pilot.[641] Mr Hunter stated that GetSwift would provide free of charge phones and data plans sufficient for five stores and three months of data usage, and if the pilot proceeds beyond the initial five stores and into operational rollouts, Pizza Hut will be able to retain the phones free of charge and will take over any data plans if they chose to do so. Mr Hunter said "[i]f by some outside chance there is no further

[634] GSWASIC00040859.
[635] GSWASIC00040859; Branley Affidavit (GSW.0009.0033.0001_R) at [42].
[636] GSWASIC00040859.
[637] Branley Affidavit (GSW.0009.0033.0001_R) at [42].
[638] GSWASIC00040859.
[639] GSWASIC00040859.
[640] GSWASIC00040792.
[641] GSWASIC00052805 at 2806.

operational roll-out beyond the 5 stores these devices will be returned to GetSwift after 3 months".[642]

Recommencement of the trial and decision not to continue

441 In about September 2017, the website project concluded and the GetSwift project was reinstated. At about this time, system integration between GetSwift and Pizza Pan's Point of Sale System was completed to a point where Mr Branley was satisfied that three Equity Stores located at Cambridge Gardens, Glenwood and St Marys could commence phase one of the initial roll-out pilot. It was around this time that a representative of GetSwift supplied around 30 mobile phones for the drivers to use during the trial.[643]

442 Between October and November 2017, to test the system integration, the initial roll-out pilot occurred in the three Equity Stores in Cambridge Gardens, Glenwood and St Marys.[644]

443 In December 2017, Mr Branley and Ms Wong prepared a report which covered the progress of GetSwift integration and identified what needed to be done for a full roll-out.[645] It recognised that the "primary effort" for the next stage (dispatch automation) rested with Pizza Pan "Tech", and not GetSwift. On page three, under the heading "GPS 12 Week Trial Summary (Sept – Nov 2017) it stated:

> - 30 mobile devices supplied to support the GPS trial at Cambridge Gardens, Glenwood Park and St Marys
>
> …
>
> - Identified issues relating to handling multiple deliveries which has been resolved, but yet to be tested.
> - Deliveries captured approx.. 70% with the trial stores, issues with the rest
>
> …
>
> - Enabling the process was more challenging than expected. Initial onboarding process and workflow was positive however required a [sic] 6- 7 weeks to stabilise usage
>
> …

[642] GSWASIC00052805 at 2806.
[643] Branley Affidavit (GSW.0009.0033.0001_R) at [44]–[45].
[644] Branley Affidavit (GSW.0009.0033.0001_R) at [45]–[46].
[645] GSWTB0002.

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- Drivers not able to log in
- Jobs noT closing consistently via geofencing
- Unable to reliably handle multiple deliveries
- Delivery time in reporting have unusual calculations
- Network connectivity causing deliveries to be tracked halfway or not completing

444 The report also showed that the project had eight stages and that the project was currently in stage one (being the trial stage), listed remaining tasks to be undertaken for stage one, and showed that it was estimated that stage one and two would take a further six months to complete. The report also posed a number of questions including "do we continue the trial at three stores until we achieve stage 2 (automated dispatch)?"[646]

445 Mr Branley provided the report to Pizza Pan's new CEO in early 2018 for a decision to be made about the next steps.[647] The findings of the report were also shared with Mr Timi Cheng, Pizza Pan's acting Chief Operating Officer.[648]

446 In about early February 2018, Mr Branley told Ms Wong to inform Mr Hunter and Mr Macdonald that Pizza Pan had decided not to continue with the GetSwift product at that time.[649] In February 2018, the mobile phones that had been supplied by GetSwift to test the integration were returned to GetSwift.[650] Mr Branley never received an invoice from GetSwift for payment in relation to services provided.[651]

447 As to how things progressed after this point in time, this is not sufficiently addressed in the evidence. Mr Branley recalled, however, the Pizza Pan Agreement required any notice of non-renewal to be given in writing, and that no such notice was annexed to his affidavit.[652]

[646] GSWTB0002.
[647] Branley Affidavit (GSW.0009.0033.0001_R) at [47].
[648] Branley Affidavit (GSW.0009.0033.0001_R) at [48].
[649] Branley Affidavit (GSW.0009.0033.0001_R) at [49].
[650] Branley Affidavit (GSW.0009.0033.0001_R) at [49].
[651] Branley Affidavit (GSW.0009.0033.0001_R) at [50].
[652] T580.40–44 (Day 8).

G.1.4 *All Purpose Transport*

448 All Purpose Enterprises Pty Ltd trading as All Purpose Transport Group (**APT**) operates a transport business, based in Berrinba, Queensland. During the relevant period, APT principally arranged deliveries between businesses but also delivered goods to consumers on behalf of businesses such as IKEA and King Furniture.[653]

449 APT's Finance Manager, Mr Alexander White, first heard about GetSwift and its software as a service platform through one of APT's customers, Lion Dairy and Drinks (a division of Lion Pty Limited) (**Lion**). APT had been providing milk delivery services to Lion for a number of years.[654]

Preparation of the APT Agreement

450 On 21 March 2017, Mr Macdonald provided an online introductory presentation about GetSwift for APT's management team including Mr White.[655] After the presentation, APT's management team held a meeting, at which they decided that APT should progress to a trial agreement with GetSwift.[656] Mr White was given responsibility for negotiating with GetSwift in relation to any agreement with GetSwift.[657] The agreement was negotiated by emails and (occasional telephone calls) between Mr Macdonald and Mr White between 23 March 2017 and 2 May 2017.[658]

451 On or around 23 March 2017, Mr White reviewed a document entitled "Term Sheet", which was to constitute the agreement between GetSwift and APT. The proposed term sheet specified a term of 37 months, comprising a "free trial period" of 1 month, followed by an "initial term" of 36 months. In relation to fees for use of the GetSwift Platform, the term sheet specified set rates per delivery, which varied depending on the volume of deliveries submitted in a month.[659]

[653] Affidavit of Alex Timothy White affirmed 12 September 2019 (**White Affidavit)** (GSW.0009.0006.0001_R) at [5], and [7].
[654] White Affidavit (GSW.0009.0006.0001_R) at [8].
[655] White Affidavit (GSW.0009.0006.0001_R) at [11].
[656] White Affidavit (GSW.0009.0006.0001_R) at [31].
[657] White Affidavit (GSW.0009.0006.0001_R) at [14].
[658] White Affidavit (GSW.0009.0006.0001_R) at [14]–[24].
[659] White Affidavit (GSW.0009.0006.0001_R) at [15]; GSWASIC00047612.

452 Mr Macdonald arranged to provide a demonstration of the GetSwift Platform to Mr White in April 2017. This meeting was re-scheduled several times to various dates in April.[660]

453 On 26 April 2017, Mr White sent an email to Mr Macdonald raising a number of queries in relation to the proposed term sheet. In this email, Mr White stated:

> I tried to call but just got your messagebank, I would like to speak to you and run through the following questions.
>
> - If we go ahead with the trial and it is successful and we roll into the initial term are there any minimum charges / minimum deliveries per month that apply?
>
> - I ask as we will be using Getswift for specific customers and if a customer were to leave it may result in a significant drop in the monthly deliveries
>
> - As discussed can you clarify how route optimisation is charged?
>
> - Per optimisation run or on actual allocation of the selected route optimisation run
>
> - Can you clarify the pricing per delivery.
>
> - The current Term Sheet seems to indicate that the charge would be $0.38 per delivery until we get over 20,000 deliveries per month. If this is correct it would be an issue. Can you please review.
>
> - As a transport company our model will require ability for multiple configurations for different customers as each customer will have slightly different data files, freight profiles etc.. While in the initial set up I am OK to work with the Getswift on each customer set up ideally an interface that enabled us to set up new customer configurations and that had more ability to configure around drivers etc.. would be necessary. Is this likely to be part of your product development.[661]

454 On 27 April 2017, Mr Macdonald and Mr White exchanged emails in relation to the queries raised by Mr White in his email dated 26 April 2017.[662]

Entry into the APT Agreement

455 On 2 May 2017, Mr White, on behalf of APT, signed a one-page agreement entitled "Term Sheet" with GetSwift, and the parties thereby entered into an agreement by which APT agreed, among other things, to use GetSwift's services for an initial period expiring on 1 June 2017

[660] White Affidavit (GSW.0009.0006.0001_R) at [17]; GSW.0022.0002.0020.
[661] GSW.0022.0003.0006.
[662] GSW.0022.0003.0009; GSW.0022.0003.0013; GSW.0022.0003.0017.

(referred to as a "Free Trial Period") (**APT Agreement**).[663] Following the "Free Trial Period", an "Initial Term" of 36 months would commence unless APT gave notice, at least seven days prior to the expiration of the free trial period, that it did not wish to continue with the agreement.[664] Accordingly, 23 May 2017 was the date by which APT was required to give written notice of any decision not to continue with the agreement, otherwise the initial term would commence on 1 June 2017. Mr White understood this when he signed the APT Term Sheet.[665] Mr White sent an email to Mr Macdonald attaching the signed APT Agreement.[666] In this email, Mr White stated:

> We look forward to using Get Swift to provide add on capability to our core Transport Management system. We would like to make the most of the 1 month trial phase so if you could send through detail of all of the information you require to get the implementation started ASAP it would be appreciated.[667]

456 On 3 May 2017, Mr Macdonald sent an email to Mr White attaching the countersigned APT Agreement.[668]

The APT Announcement

457 At 8:43am on 8 May 2017, Mr Macdonald sent an email to Mr Mison (copied to Mr Hunter, Mr Eagle and Ms Gordon) in which he stated: "Please release this announcement to ASX right now and let me know once done".[669] The first draft of the APT Announcement appears to have been prepared by Mr Hunter on 29 April 2017.[670] Mr Macdonald did not instruct Mr Mison to mark the APT Announcement as price sensitive.

458 At 11:04am on 8 May 2017 – before the expiry of the free trial period – GetSwift submitted an announcement concerning the APT Agreement to the ASX entitled "All Purpose Transport sign commercial agreement" (**APT Announcement**).[671] At 11:08am, the ASX released the

[663] GSW.0022.0003.0025.
[664] GSW.0022.0003.0025; White Affidavit (GSW.0009.0006.0001_R) at [23].
[665] T589.36–40 (Day 8); T591.38–44 (Day 8).
[666] GSW.0022.0003.0024 attaching GSW.0022.0003.0025.
[667] GSW.0022.0003.0024.
[668] GSW.0022.0003.0027 attaching APT Agreement (GSW.0022.0003.0026).
[669] GSWASIC00020228 attaching GSWASIC00020229.
[670] GSWASIC00045724 (file metadata records date as 29 April 2017 and "Bane" as the author).
[671] APT Announcement (GSW.1001.0001.0476); GSWASIC00020225 attaching GSWASIC00020226; Agreed Background Facts (GSW.0002.0002.0001) at [37]–[38].

APT Announcement as "price sensitive".[672] The APT Announcement stated that GetSwift had signed an "exclusive commercial multi-year agreement with [APT]". Mr White did not have any communication with GetSwift in relation to the APT Announcement before its release and had not seen a copy until one was produced to him by an officer of ASIC.[673]

459 At 11:09am, Mr Mison sent an email to Mr Hunter, Mr Macdonald, Mr Eagle, and Ms Gordon, forwarding an email from the ASX attaching the APT Announcement. In this email, Mr Mison stated: "ASX release confirmation".[674]

460 Later on 8 May 2017, Mr Macdonald sent an email to Mr Wakeham, APT's IT Manager (copied to Mr White), in which he stated, "Hi Tim! Introducing you to Jamila Gordon our group CIO and Stephanie Noot your account contact who will be able to assist in getting you all set up."[675]

461 On the same day, Mr Macdonald sent an email to Ms Gordon and Ms Noot, in which he stated:

> Just an FYI:
>
> These guys will want to use routing.
>
> This will take some time to set up routing for them on their account. So we need to warn them to get the basics going first without routing and then he needs to tell us what routing rules they use so we can configure his account.
>
> This will buy us time to implement routing.[676]

Variation of the APT agreement with GetSwift and issues with the csv. file

462 During early May 2017, APT experienced difficulties with the GetSwift Platform. Although APT had access to the GetSwift "Portal" and were able to enter basic information, they were not able to enter or route jobs (delivery orders) satisfactorily on the GetSwift Platform.[677] Due to the ongoing problems with the GetSwift Platform, Mr White informed Mr Macdonald via a series of emails that APT required the trial period under the APT Agreement to be extended until such time as APT could enter and route jobs.[678]

[672] Agreed Background Facts (GSW.0002.0002.0001) at [38].
[673] White Affidavit (GSW.0009.0006.0001_R) at [26].
[674] GSWASIC00020225 attaching GSWASIC00020226.
[675] GSWASIC00045396 at 5397.
[676] GSWASIC00045396.
[677] White Affidavit (GSW.0009.0006.0001_R) at [27].
[678] White Affidavit (GSW.0009.0006.0001_R) at [28(a)]–[28(b)].

463 At 10:20am on 18 May 2017, Mr White sent an email to Mr Macdonald, in which he stated:

> This email is to notify GetSwift that due to a lack of any progress in setting up our account we require our trial period to be extended until such time that we are able to import and route jobs. If an extension is not agreed to we will need to cancel our agreement with GetSwift.[679]

464 Mr White went on to explain that "[c]urrently we have not been able to use GetSwift as we have been unable to import any live jobs due to limitations with the standard importer". Mr White then set out three "key issues we need to resolve". The three matters comprised the following: *first*, the "ability to import all necessary data for each job", including cubic volume, weight and other data; *secondly*, the "ability to set up specifications of a vehicle", including carrying capacity and special characteristics; and *thirdly*, the "ability to be able to create routes" based on the job and vehicle specifications.[680]

465 At 3:36pm, Mr Macdonald replied to Mr White in the following terms:

> … happy to extend the trial. By way of setting expectations, the three points below you have mentioned are not flick of switch type features and will take some time to get going/ configured on your account. The csv is a customization development we would need to do on our end as we have standard column headers that we accept as part of a successful csv template upload. The driver capacity in the way you want it is also a configuration that requires development of code into your account, as is the routing rules you require specifically as laid below.
>
> What I would suggest is way agree to a phase 1, 2, 3 milestone approach and to start with: the low hanging fruit would be to get the .csv file going for you so you can commence trial with GetSwift (whilst continuing to use your own routing software until we look to commence configuring your account with the right routing options)
>
> Would this be a reasonable approach for you?[681]

466 At 4:11pm, Mr White sent an email to Mr Macdonald in response to his email of 3:36pm, stating:

> I am OK with the three stage approach though I would like to get a realistic time frame for each step. If we are talking a couple of weeks at most for each step that might be workable, however, if it is likely to be substantially longer I would need to understand the timeframe before committing to go further.
>
> So long as the time frames are workable starting with the csv file would be good.

[679] GSW.0022.0001.0026 at 0032.
[680] GSW.0022.0001.0026 at 0032–0033.
[681] GSW.0022.0001.0026 at 0032–0034.

…

> If you can get back to me regarding with realistic timeframes for implementation it would be appreciated.[682]

467 Between 4:11pm on 18 May and 30 May 2017, Mr White and Mr Macdonald exchanged further emails in relation to the specific requirements for the csv file, including requirements relating to routing.[683]

468 On 25 May 2017, Mr Macdonald advised Mr White that he had asked Ms Gordon and Ms Noot to organise a call with Mr White to "take care of anything further to get you up and running".[684]

469 On the morning of 31 May 2017, Ms Gordon, Ms Noot, Mr White and Mr Wakeham had a conference call during which Ms Gordon asked Mr Wakeham to send her a 'sample .csv file'.[685] Ms Gordon understood that her role regarding APT included assisting APT in resolving the technical problems it was experiencing with uploading and importing jobs into the GetSwift platform.[686] At 11:40am, Mr Wakeham sent to Ms Gordon the .csv file that he had attempted to import into the GetSwift platform.[687] Ms Gordon responded the following day, stating: "I have uploaded the csv file you sent to me and it works now, but I had to change the date in the file to today's date. Please test it and let me know how you go."[688]

470 Ms Gordon accepted that by mid-morning on 1 June 2017, having received the .csv file from Mr Wakeham, she had fixed the problem and the file had been imported onto the GetSwift platform.[689]

471 On 4 June 2017, Mr White sent an email to Mr Macdonald in the following terms:

> As per the email below there was an agreement to extend the [t]rial period due to our inability to start using the product. Jamila got back to Tim on Friday to let him know that it should be Ok to start importing, however, on the week[end] the trial was cancelled and we cannot use the system as it says we have not [*sic*] credit. Can you please get this fixed urgently so we can start to use the system and start the trial period

[682] GSW.0022.0001.0026 at 0030–0031.
[683] See GSW.0022.0001.0026 at 0027–0028.
[684] GSW.0022.0001.0026.
[685] Gordon Affidavit (GSW.0009.0021.0001_R) at [162]; T347.34–39 (Day 5).
[686] T347.19–24 (Day 5).
[687] GSW.0022.0001.0066 at 0067.
[688] GSW.0022.0001.0066.
[689] T348.4–6 (Day 5).

from now.[690]

472 On 5 June 2017 at 9:26am, Mr Macdonald emailed Mr White, stating that the login problem was "[p]robably just the robot doing the auto cancel after 14 days" and that Mr Macdonald had "added more credit" to APT's account.[691]

473 On 5 June 2017 at 7:39am, Mr Wakeham also alerted Ms Gordon to the problem with logging into the GetSwift platform, advised Ms Gordon by email that he had not been able to "login over the weekend to have a look at the jobs you imported", and inquired whether she could "re-enable the trial so that I can take a look today".[692] A short time later at 10:11am, Ms Gordon sent an email to Mr Wakeham, stating: "This is now fixed, let me know how you go". Ms Gordon accepted that by her email, she was informing Mr Wakeham that he could now log on to the GetSwift platform.[693]

474 In cross-examination, Mr White was taken to the email he sent to Mr Macdonald dated 4 June 2017. Mr White said he was uncertain as to whether the difficulty of running out of credit had been rectified by Mr Macdonald. Mr White did not accept that this was because he had not spoken to Mr Wakeham regarding the issue.[694]

475 On 7 June 2017, Mr Wakeham sent an email to Ms Gordon with subject line "Sample import file", asking her for technical assistance in relation to the csv file, and whether she could "please send me the file you imported so I can see what difference there is between it and what I'm importing?"[695] Ms Gordon did not reply to this email.

476 On 13 June 2017, Mr Macdonald sent an email to Ms Gordon, Ms Noot and Ms Cox, in which he inquired whether APT had been taken care of and were using the platform yet, noting that he was aware "they had a number of support questions in previous threads as well were waiting on a .csv file to be created by our team?"[696] Ms Gordon replied "They are all good. The csv file is working. I've spoken with Tim last week and he said he will call me if he has any

[690] GSW.0022.0003.0029 at 0030.
[691] GSW.0022.0003.0029.
[692] GSW.0022.0001.0066.
[693] T349.4–9 (Day 5).
[694] T594.15–28 (Day 8).
[695] GSW.0022.0003.0035.
[696] GSWASIC00044526.

issues".[697] Ms Gordon agreed that she had meant to convey to Mr Macdonald that the .csv file "was working for [APT] and Tim confirmed".[698] Indeed, so far as Ms Gordon was aware, APT was able to use the GetSwift platform.[699]

APT's demonstration of the GetSwift Platform to Mr Nguyen of Fantastic Furniture

477 One factual circumstance that has remained in dispute between the parties concerns APT's alleged demonstration of the GetSwift Platform to Mr Simon Nguyen from Fantastic Furniture.

478 On 9 June 2017, Mr Paul Kahlert, who was the General Manager for APT, sent an email to Mr Macdonald copying Mr Nguyen. In that email, Mr Kahlert wrote:

> One of our great customers Fantastic Furniture asked me to demonstrate your product with the view to using this for their home delivery services.
>
> I was able to show them the Dairy Farmers (Lion) screens to show them high-level how the system works.
>
> I have included Simon Nguyen on this email – He is the primary contact. Pass this over to you.[700]

479 In cross-examination, Mr Nguyen gave the following answers when confronted with that email:

> And Mr Kahlert told you, did he, in early June 2017, that APTs delivery drivers were using the GetSwift software for deliveries performed by the APT drivers for one of their customers? --- Yes.
>
> And did you understand that the APT delivery drivers for that customer were actually using the GetSwift software in early June 2017? --- Yes.
>
> …
>
> Did Mr Kahlert … given you a demonstration of the GetSwift software? --- Yes.
>
> And what had he showed you? What did you see when he gave you that demonstration? --- He showed me how the trucks were travelling around Queensland.
>
> So you saw the trucks being GPS tracked in real-time: is that right? --- Yes.[701]

480 As I will explain below, GetSwift draws upon this communication to highlight that any problems with the .csv file and otherwise, which had prevented APT's drivers from using the

[697] GSWASIC00044526.
[698] T351.3–11 (Day 5).
[699] T351.13–14 (Day 5).
[700] GSWASIC00018605.
[701] T642.45–643.36 (Day 9).

platform, had been rectified. To the contrary, ASIC contends that Mr Nguyen was mistaken about what it was that he had seen,[702] and places reliance on Mr White's unchallenged affidavit evidence in respect of this fact:

> 8. I first heard about GetSwift Limited (GetSwift) and its software as a service platform through one of All Purpose's customers, Lion Dairy and Drinks (a division of Lion Pty Limited) (Lion). All Purpose has provided milk delivery services to Lion for a number of years.
>
> 9. In 2016, in the course of All Purpose providing Lion with milk delivery services, I became aware that Lion was using the GetSwift platform to monitor deliveries of its products to merchants. Lion provided about 15 of All Purpose's delivery subcontractors with devices that had the GetSwift application installed. In 2016, an employee of All Purpose, whose name I cannot now recall, explained to me that the delivery subcontractors received delivery instructions via the app, and that Lion was able to monitor and manage the deliveries through the GetSwift platform. Staff from Lion provided All Purpose's staff with login details, so that we could also log in to the GetSwift portal and monitor these deliveries. This provided me with some understanding as to how the GetSwift platform or portal operated … All Purpose did not, however, have any direct dealings with GetSwift in relation to the arrangement with Lion.[703]

481 Mr Kahlert's email, and the cross-examination which ensued, is an issue to which I will return below (at [1429]).

Mr Macdonald learns of the current circumstances

482 On 8 July 2017, Mr Macdonald sent an email to Mr Kurt Clothier (GetSwift's Customer Success Manager) and Ms Stephanie Noot (copied to Ms Gordon) in which he stated:

> How is all purpose transport going with their account? Their trial will need to be stopped once they have had 30 days use. Any issues that we need to address with them?[704]

483 Ms Noot replied stating:

> I have removed all the credit we added for them to use during the trial. Their trial ended on 5 July 2017.
>
> Their job fee is currently: $0.00 and their SMS fee is $0.20 – should I change this to $0.00 also?

[702] ACS at [581].
[703] White Affidavit (GSW.0009.0006.0001_R) at [8]–[9].
[704] GSWASIC00041610.

…

Please note [they] have not uploaded a job since 7 June 2017".[705]

484 The reference to the job uploaded on 7 June 2017 appears to be the sample import .csv file which either Ms Gordon or Mr Wakeham uploaded.

485 On 9 July 2017, Mr Macdonald sent a further email to Ms Noot in which he stated:

> Steph I left that over to yourself and Jamila to manage – Fid [*sic*] you not reach out to them each week to see how they were going?
>
> They have not used GetSwift for a month which tells me they have dropped off because we dropped the ball and didn't make sure everything was OK. Guys this is not good at all.
>
> I am handing this account to Kurt to manage from now on.[706]

486 On 10 July 2017, Mr Hunter sent an email to Mr Macdonald in which he stated: "Please start the process of transitioning Steph out as discussed by end of this month after the 4c".[707] Mr Hunter then sent a further email to Mr Macdonald in which he stated:

> Zero Follow up. We can't be done thing up [*sic*] clients just to have our back office lose them . The whole back office starting w tech and finance is full of excuses for something - where is the accountability and responsibility when things go wrong? Once ok, but if it's a consistent series of issues it's a systematic problem.[708]

487 Later that day, Mr Macdonald replied, stating:

> They did have credit but never used it. Steph and Jamila were responsible with on-boarding them and there was zero follow up and zero care for making sure they were ok.[709]

488 Mr Hunter replied to this email, stating: "Im [*sic*] done with those two. Steph goes at months [*sic*] end."[710]

489 Following these emails from Mr Macdonald, Mr Clothier emailed Mr White, asking "I see there are a few users and would like to know if you are happy with the trial?"[711] Mr White deposed, in relation to that email, that:

[705] GSWASIC00041579.
[706] GSWASIC00041579.
[707] GSWASIC00041539 at 1540.
[708] GSWASIC00041539 at 1540.
[709] GSWASIC00041539.
[710] GSWASIC00041539.
[711] GSW.0022.0001.0068.

> 36. Given GetSwift's inability to provide [ATP] the basic functionality of importing data to even start the trial and their lack of communication, I did not respond to Kurt Clothier's email and did not contact anyone at GetSwift after the date of that email. …
>
> …
>
> 37. I was not satisfied with the level of customer service [ATP] had received from GetSwift. By the date of Kurt Clothier's 10 July email, it had been more than two months since the signing of the term sheet. In that period Wakeham had reported to me on a regular basis, including as set out above, that he had not been able to upload, enter or route any jobs on the GetSwift platform, and therefore [ATP] could not commence any trial of the GetSwift platform.[712]

490 Mr White did not respond to Mr Clothier's email nor contact anyone at GetSwift after 10 July 2017.[713] He is not aware of anyone else at APT having contacted GetSwift after the date of Mr Clothier's email.[714] Mr White further explained that as at the date of his affidavit, he had not, and was not aware of anyone at APT having, uploaded, entered or routed any jobs on the GetSwift platform and that APT had not made a single delivery using the GetSwift platform.[715]

491 On 17 July 2017, Mr Macdonald sent an email to Mr Clothier in which he stated: "Any word back from [APT] and what they needed to get their trial underway?" to which Mr Clothier replied: "I called and emailed Tim as well as Alex but no response yet".[716] On 21 July 2017, Mr Clothier informed Mr Macdonald that Mr White was on holiday and would be back the following week.[717] There is no evidence that Mr Macdonald was thereafter updated on APT's attitude towards using the GetSwift platform. On 8 August 2017, Mr Ozovek sent an email to, among others, Mr Hunter, Mr Macdonald and Ms Gordon, with subject line "Minutes/Actions from 7-8 August Program All Hands Meeting" which included as an item under the heading "Key Decisions": "Deprioritize All Purpose Transport until routing algorithm is in place".[718]

GetSwift's Weekly Transaction Reports record zero deliveries for APT

492 During 2017, GetSwift prepared weekly spreadsheet reports entitled "Profit & Loss and Metrics", which were typically circulated by Mr Ozovek of GetSwift to Mr Hunter and Mr

[712] White Affidavit (GSW.0009.0006.0001_R) at [36]–[37].
[713] T594.30–46 (Day 8).
[714] White Affidavit (GSW.0009.0006.0001_R) at [36].
[715] White Affidavit (GSW.0009.0006.0001_R) at [38].
[716] GSWASIC00041456 at 1457.
[717] GSWASIC00070871.
[718] GSWASIC00040709.

Macdonald under cover of an email entitled "Weekly Metrics for Week Commencing [date]" (**Weekly Transaction Reports**).[719] Each Weekly Transaction Report had a number of tabs, including one called "Onboarding". The Onboarding tab had a list of GetSwift customers and, relevantly, columns for each month headed "Actual transaction figures". For certain customers, these columns were populated with the number of transactions (or deliveries) made in that month. APT was first listed in the Onboarding tab of the Weekly Transaction Report for March 2017.[720] The "Actual transaction figure" recorded for APT was a dash (that is, zero deliveries). Each subsequent Weekly Transaction Reports dated between 1 April 2017 and 5 August 2017 records a dash for APT.[721]

493 On 3 August 2017, Mr Macdonald sent an email to Mr Ozovek. Mr Macdonald stated, relevantly: "APT need update from Kurt now Alex is back – we have routing engine coming out for them shortly".[722]

494 On 26 November 2017, Mr Ozovek sent an email to Mr Hunter, Mr Macdonald, and Ms Cox attaching the Weekly Transaction Report for 18 November 2017. The report recorded a dash (zero deliveries) for APT for every month up to and including October 2017.[723]

495 On 22 January 2018, Mr Macdonald sent an email to Mr Ozovek regarding a draft email Mr Ozovek had prepared to send to certain customers in response to an article published by the AFR in relation to the nature, and status, of a number of agreements GetSwift had announced to the ASX.[724] In the email, Mr Macdonald stated:

> Hi Jon,
>
> Couple of changes:
>
> *Hello –*
>
> *As you are a valued partner of GetSwift, we wanted to provide you an important*

[719] See GSWASIC00018847 attaching GSWASIC00018849; GSWASIC00014632 attaching GSWASIC00040923; GSWASIC00057375 attaching GSWASIC00040774.
[720] GSWASIC00046154.
[721] GSWASIC00046079; GSWASIC00045849; GSWASIC00045808; GSWASIC00045643; GSWASIC00018847 attaching GSWASIC00018849; GSWASIC00044571; GSWASIC00044502; GSWASIC00043373; GSWASIC00041634; GSWASIC00041583; GSWASIC00041464; GSWASIC00014632 attaching GSWASIC00040923; GSWASIC00057375 attaching GSWASIC00040774; GSWASIC00040500.
[722] GSWASIC00040805.
[723] GSWASIC00034321 attaching GSWASIC00034325.
[724] GSWASIC00033244.

> *update. There has been some rather inaccurate press stemming out of Australia which the company is addressing. As part of an ASX notification of our partnership, you may get contacted unexpectedly by various parties asking about the nature of our agreement.*
>
> *As a response, please let us know if you are contacted. Additionally, we recommend you either ignore the request or simply state that we have an agreement in place and are unable to comment further due to the sensitive nature of each other's businesses.*
>
> Only needed for clients we have announced on ASX, clients we promote on website and in our case studies.[725]

496 Mr Ozovek replied to Mr Macdonald's email, stating: "Understood and will distribute. Do we have any contacts for some of them? I can find generic emails, but nothing concrete for some of them."[726] Mr Macdonald sent a further email to Mr Ozovek in which he stated: "Let me know who you are missing and I will help you fill in gaps. We should speak to cito and APT as well as I think they have both paused using?"[727] Mr Ozovek replied, "Yes. Cito, APT, Johnny Rockets Kuwait are some main ones. Asap, fresh flowers, lion etc. All those on our case study page."[728]

497 At 3:51pm that afternoon, Mr Hunter sent an email to Mr Macdonald and Mr Ozovek in which he stated: "OK these are paused only right? That's what I am understanding right? APT is the only one that I am aware that terminated but the impact is immaterial."[729] Mr Ozovek responded: "Yes sir. They were paused".[730] It is notable that Mr Hunter characterised APT as having "terminated" and not merely "paused".

G.1.5 *CITO Transport Pty Ltd*

498 During 2017, CITO Transport Pty Ltd (**CITO**) operated a Melbourne-based transport business providing delivery and warehousing services to wholesale customers within the freight forwarding and logistics industry.[731]

[725] GSWASIC00033244 (emphasis omitted).
[726] GSWASIC00033244.
[727] GSWASIC00033244.
[728] GSWASIC00033244.
[729] GSWASIC00033244.
[730] GSWASIC00033244.
[731] Affidavit of Paul Simon Calleja affirmed 19 September 2019 (**Calleja Affidavit**) (GSW.0009.0034.0001_R) at [5].

499 In March 2017, CITO's founder and director, Mr Paul Calleja, was contacted by Mr Simon Borg, who was a director of CITO and who was also a director of a freight forwarding and logistics company known as Navia Logistics Pty Ltd (**Navia**).[732] Mr Borg informed Mr Calleja that Navia had been approached by GetSwift as part of a trial that Philip Morris International (**PMI**) was conducting of the GetSwift platform. Mr Borg indicated to Mr Calleja that Navia did not intend to participate in the trial, but that he thought CITO might be interested.[733] Mr Calleja told Mr Borg that he was keen to learn more about the proposal.[734]

500 On 28 March 2017, Mr Borg sent an email to David Velasquez of PMI and Mr Calleja, copying, among others, Mr Kosta Metaxiotis, a representative of PMI. In that email, Mr Borg provided Mr Calleja's mobile telephone number and suggested that PMI arrange a telephone conference with Mr Calleja.[735]

501 Mr Calleja was subsequently approached by Mr Metaxiotis, who enquired whether CITO might be interested in providing storage and delivery services to PMI.[736] The proposed arrangement with PMI concerned an online sales service that PMI was launching, whereby customers could place orders for PMI products online and receive and track delivery of those goods.[737] PMI needed storage and delivery services to be provided as part of the project.[738] Following his conversation with Mr Metaxiotis, Mr Calleja decided that CITO should participate in the trial, as it would provide Mr Calleja with an opportunity to "see GetSwift's software in action" and consider the possibility of using the GetSwift Platform for CITO's own operations.[739]

Negotiations between CITO, PMI and GetSwift

502 On 29 March 2017, Mr Macdonald sent an email to Simon Navia of Navia Transport, attaching a document entitled "Term Sheet". In this email, Mr Macdonald stated:

> How's it all going with PMI?

[732] Calleja Affidavit (GSW.0009.0034.0001_R) at [8].
[733] Calleja Affidavit (GSW.0009.0034.0001_R) at [9].
[734] Calleja Affidavit (GSW.0009.0034.0001_R) at [10].
[735] GSWASIC00023200 at 3204.
[736] Calleja Affidavit (GSW.0009.0034.0001_R) at [11], and [21]; GSWASIC00046053.
[737] Calleja Affidavit (GSW.0009.0034.0001_R) at [11]; T624.6–7 (Day 8).
[738] Calleja Affidavit (GSW.0009.0034.0001_R) at [11].
[739] Calleja Affidavit (GSW.0009.0034.0001_R) at [13]; T598.45 (Day 8).

> They said CITO is now handling the fulfillment [*sic*] to kick off shortly which is great? I think PMI are itching to kick things off and already talking about broader scope outside of Melbourne.
>
> Do you have any partners in Sydney and Brisbane who would be interested in handling similar operation for PMI as CITO will be doing in Melbourne?
>
> For Melbourne: I want to make sure CITO have similar pricing discounts as they grow with this partnership. Same terms as Navia.
>
> Can you please have them sign and return attached term sheet so we can get this moving for them and PMI next week?[740]

503 Between early April and 15 May 2017, Mr Calleja exchanged emails with both Mr Metaxiotis and Mr Macdonald in relation to a proposed commercial arrangement involving PMI, CITO and GetSwift.[741]

504 One of Mr Calleja's early concerns about the proposed arrangement was that he was expected to bill GetSwift for the cartage services CITO provided to PMI.[742] On 30 March 2017, Mr Calleja sent an email to Mr Metaxiotis in which he stated CITO's position was that it would not be prepared to bill GetSwift for cartage and that CITO would need to bill PMI.[743]

505 On 3 April 2017, Mr Macdonald sent an email to Mr Calleja attaching an updated draft term sheet. In this email, Mr Macdonald stated:

> Just wanted to follow up here as we are approaching a trial launch date with Philip Morris and to get our ducks in order. You will be required to invoice GetSwift for your services and GetSwift will be paying you. I sent Simon from Navia a term sheet to outline the pricing arrangement we have all agreed to with this engagement. If you could send us your invoicing & pricing terms so we can approve them and then execute the below proposed term sheet to finalise this engagement.[744]

506 On 4 April 2017, Mr Metaxiotis sent an email to Mr Calleja, in which he described GetSwift as "a key component of this venture [and] our business partner who we need on board to execute our requirements".[745] Mr Metaxiotis asked Mr Calleja to confirm his "willingness to sign [on] to [GetSwift's] platform" so that the trial with PMI could commence.[746] Mr Calleja

[740] GSWASIC00023814 attaching GSWASIC00046404.
[741] Calleja Affidavit (GSW.0009.0034.0001_R) at [11]–[39].
[742] Calleja Affidavit (GSW.0009.0034.0001_R) at [22].
[743] Calleja Affidavit (GSW.0009.0034.0001_R) at [22]; GSWASIC00046053 at 6059.
[744] GSWASIC00023409 attaching GSWASIC00042670.
[745] GSWASIC00046053 at 6058.
[746] GSWASIC00046053 at 6058.

responded by email later that day, stating that "in an attempt to create exciting new business", he was "willing to deal with GetSwift for the transport component".[747] Mr Calleja asked Mr Metaxiotis to "confirm payment terms" and stated that he would "need GetSwift to supply training and if possible a physical presentation" on how the proposed arrangement was going to work.[748] Mr Metaxiotis forwarded Mr Calleja's email to Mr Macdonald and others at GetSwift a short time later, stating, "[c]an you follow through to ensure they are OK with your system".[749]

507 On 4 April 2017, Mr Macdonald sent an email to Mr Hunter attaching a copy of the draft term sheet, in which he stated, "can you please edit this term sheet for CITO so it covers off GetSwift invoicing PMI and paying CITO?"[750]

508 On 5 April 2017 at 7:34am, Mr Macdonald wrote to Mr Calleja, noting that he had sent a draft agreement to an employee of CITO the previous day and asking whether Mr Calleja had looked at that agreement.[751] Mr Calleja replied to Mr Macdonald's email, stating: "We are excited about this new business and looking forward to getting a better understanding on how this is all going to work. I will be more than happy to [enter] an agreement with [GetSwift] just need it sent to me".[752] At 12:26pm, Mr Macdonald sent Mr Calleja a draft term sheet dated 4 April 2017.[753] Clause 4 of the term sheet stated that the term of the agreement would be 36 months.

509 Clause 5 of the draft term sheet provided, relevantly:

> Any fees that CITO may charge other parties that are either clients of GetSwift or are on the GetSwift platform will need to be processed and managed through [the] GetSwift platform and services. GetSwift will pay received amounts that are payable to CITO within 3 business days of receipt of such fees from the responsible parties. GetSwift will not guarantee payments or their timeliness, it will only process and pass through any that may be received.[754]

[747] GSWASIC00023200.
[748] Calleja Affidavit (GSW.0009.0034.0001_R) at [23]–[24]; GSWASIC00023200.
[749] GSWASIC00023200.
[750] GSWASIC00023055.
[751] GSWASIC00046053 at 6057.
[752] GSWASIC00046053 at 6056.
[753] GSWASIC00046053 at 6056 attaching GSWASIC00046142; GSWASIC00046130 at 6132.
[754] GSWASIC00046142.

510 Following receipt of the term sheet, Mr Calleja raised with Mr Macdonald a number of commercial concerns with the arrangement proposed, namely, that CITO could not make any minimum volume commitment as it concerned PMI's deliveries, and that (in relation to clause 5) CITO required GetSwift to guarantee payment of all moneys owing to CITO for its delivery services.[755] Mr Calleja also had concerns that the term was for 36 months.[756]

511 On 7 April 2017, Mr Macdonald sent an email to Mr Calleja attaching a revised "Term Sheet".[757] Mr Macdonald stated that the delivery volume guarantee had been removed from the draft agreement. In relation to Mr Calleja's concerns regarding payments to be made to CITO, Mr Macdonald stated:

> GetSwift is the marketplace, not the customer. We are facilitating a transaction between two parties (CITO & PMI). We can only pass on monies that have been paid by PMI. If PMI don't pay then we don't have any money to pay you. Being such a blue chip company as PMI, I don't see this ever being an issue.[758]

512 Later that day, Mr Macdonald sent an email to Mr Hunter forwarding the email he sent to Mr Calleja.[759]

513 Mr Calleja was not satisfied with Mr Macdonald's response as set out in the email and did not want to engage with PMI and GetSwift on the basis set out in the term sheet and decided that CITO would not to take part in the cartage side of the project."[760] On about 10 April 2017, Mr Calleja sent an email to Mr Metaxiotis (copied to Mr Macdonald), in which he said the following:

> I feel that we may not be the option for the cartage side to this project but am willing to handle the warehousing side. We have a credit application that needs to be successfully completed before we do any business. The unique set up you have with GetSwift will pose issues through this signing up process.
>
> I do not have anything against [GetSwift], in actual fact I believe they are on to something big. Kosta please understand after 15 years of running my own company I have established a set of rules I will not break for anyone/company.[761]

[755] Calleja Affidavit (GSW.0009.0034.0001_R) at [26]–[27]; GSWASIC00046053 at 6054.
[756] Calleja Affidavit (GSW.0009.0034.0001_R) at [26]–[27].
[757] GSWASIC00046116 attaching GSWASIC00046129.
[758] GSWASIC00046116.
[759] GSWASIC00046116.
[760] Calleja Affidavit (GSW.0009.0034.0001_R) at [30].
[761] GSWASIC00046053.

514 In cross-examination, Mr Calleja agreed that, based on what he knew about the GetSwift platform on 10 April 2017, he believed that the software had the potential to become very successful and be useful to a lot of businesses, including CITO.[762]

515 On 11 April 2017, Mr Calleja sent an email to Mr Macdonald (copied Mr Metaxiotis and others), in which Mr Calleja stated: "I have decided we will not be taking part in the cartage side of this project … we are willing to host the cabinets and handle the warehousing side".[763]

516 In cross-examination, Mr Calleja agreed that originally, up until 10 April 2017, the idea was that CITO would be involved both in the warehousing of PMI's stock and also in the delivery of the stock.[764] It was suggested to Mr Calleja that, provided the GetSwift Platform met his expectations, he had every intention of CITO making deliveries via the platform separately from the PMI trial in due course, but Mr Calleja made plain:

> I have to be completely honest. The reason why I didn't get involved in the transport side of things, [was] because I was obliged to use the GetSwift system and pay for it.
>
> …
>
> I would be charged by GetSwift a percentage for every delivery, and I … wasn't happy with that. At the end of the day, I saw it as Philip Morris was my customer.[765]

517 Mr Calleja did not want CITO to have to pay for using the GetSwift platform in the course of undertaking delivery work for its existing customer PMI,[766] and wanted PMI to have the obligation to pay him, not a third party.[767] Mr Calleja explained that his "only interest was the storage and warehousing side for Phillip Morris" and that he considered walking away from the project because of GetSwift's proposed payment arrangements.[768]

518 Between 11 April and 14 April 2017, Mr Macdonald sent a number of emails to Mr Hunter forwarding the emails he had exchanged with Mr Calleja and Mr Metaxiotis.[769] Included in

[762] T599.30–47 (Day 8).
[763] GSWASIC00045942 at 5944.
[764] T599.18–20 (Day 8).
[765] T607.13–22 (Day 8).
[766] T607.10–23 (Day 8).
[767] T607.34–36 (Day 8).
[768] T608.1–15 (Day 8).
[769] GSWASIC00045942 attaching GSWASIC00022663.

those emails was the email of 11 April 2017, in which Mr Calleja informed Mr Macdonald that CITO had declined to participate in the cartage side of the arrangement with PMI.[770]

519 On 13 April 2017, Mr Metaxiotis sent a further email to Mr Macdonald, in which he stated:

> Paul at [CITO] is really positive and keen to connect with PMI and your service. Seems pretty flexible as well in treating this project as potential for future scale[.]
>
> He's basically worried from past experience that when issues arise with the intermediary the likes of [*sic*] his business are left wanting and cannot recover any lost funds. Hence why he's [*sic*] wants the credit application from yourselves. I'm unaware of any implication to [*sic*] you guys.
>
> Not sure if he mentioned it or not but he was seriously considering speaking to you about moving some of his existing business onto your platform, but has reservations about moving the cartage charges to you rather than getting it direct from the existing vendors …[771]

520 In cross-examination, Mr Calleja agreed that he "could have" had a conversation with Mr Metaxiotis prior to 13 April 2017 in which he told Mr Metaxiotis that he was considering moving some of CITO's existing business onto the GetSwift platform, but if it did occur (which is unclear) he had no recollection of it.[772]

521 On 14 April 2017, Mr Hunter sent an email to Mr Macdonald containing a draft email for Mr Macdonald to send to Mr Calleja regarding the proposed "Term Sheet", in which he described "an approach that will satisfy governance processes, whilst eliminating any perceived risk".[773]

522 On 17 April 2017, Mr Macdonald sent an email to Mr Calleja (copied to Mr Hunter and Mr Metaxiotis), in which Mr Macdonald informed Mr Calleja that CITO could invoice PMI directly, but that the transactions would need to be logged and reconciled on the GetSwift Platform.[774] Mr Macdonald expressed his hope that the proposed arrangements would "resolve any issues [CITO] may have had" and invited Mr Calleja to sign an "updated agreement" (a copy of which was attached to his email) so that the parties could "get going immediately". The email sent by Mr Macdonald was substantially in the form drafted by Mr Hunter.[775]

[770] GSWASIC00045895; GSWASIC00022540.
[771] GSWASIC00045912.
[772] T600.42–47 (Day 8).
[773] GSWASIC00022548.
[774] Calleja Affidavit (GSW.0009.0034.0001_R) at [33]; GSWASIC00022522 attaching GSWASIC00045862.
[775] GSWASIC00022522 attaching GSWASIC00045862.

523 Mr Macdonald's attempts to accommodate Mr Calleja's concerns did not change Mr Calleja's mind about the delivery component of the project. Indeed, Mr Calleja told Mr Metaxiotis again in early May 2017 that CITO would only provide the warehousing component.[776] However, Mr Calleja was ultimately persuaded to sign the term sheet because Mr Metaxiotis had told him to do so on the basis that PMI's project could go ahead, that there was no risk to CITO if he did so, and that given CITO would not be involved in the delivery side of the project, CITO would not be paying anything to GetSwift.[777]

FRF Couriers is selected to provide the delivery services

524 Between 2 and 5 May 2017, Mr Macdonald, Mr Hunter and Mr Metaxiotis exchanged emails in relation to inquiries they had made with FRF Couriers (**FRF**) in order to see whether FRF could provide delivery services to PMI.[778] In their email exchange, Mr Metaxiotis commented on the prices offered by FRF and wrote, "[u]ltimately lets go ahead at the $12.50 rate per drop but as highlighted it [is] not viable going forward – we need the achieve [*sic*] original $6.95 quoted when we first engaged…The absolute max period we could operate under this is 3 mths… [*sic*]"[779]

Entry into the CITO Agreement

525 On 10 May 2017, Mr Calleja signed the "Term Sheet" and emailed it to Mr Macdonald; however, before signing it, he crossed out point 4 of the term sheet (which specified the term was 36 months) and inserted "N/A".[780] Mr Calleja explained that he crossed out the term because he "did not want any commercial commitment or involvement with GetSwift. I did not want to be locked in to a 36 month contract, or any contract at all."[781] In cross-examination, Mr Calleja said he signed the term sheet because it was explained to him that he had to sign the term sheet in order to take any further part in the PMI trial.[782]

[776] Calleja Affidavit (GSW.0009.0034.0001_R) at [34(a)].
[777] Calleja Affidavit (GSW.0009.0034.0001_R) at [34(b)]–[34(d)].
[778] GSWASIC00020708.
[779] GSWASIC00020708.
[780] GSWASIC00045367 attaching GSWASIC00045370; Calleja Affidavit (GSW.0009.0034.0001_R) at [35].
[781] Calleja Affidavit (GSW.0009.0034.0001_R) at [35].
[782] T602.4–7 (Day 8); Calleja Affidavit (GSW.0009.0034.0001_R) at [34].

526 While Mr Calleja agreed in cross-examination that one of the reasons he wanted to take part in the PMI trial was to see the GetSwift Platform in action and explore the potential benefits to CITO, he said "it was an add-on"[783] and "a bonus",[784] but that "it wasn't a major part" of his reasons.[785] He also agreed that he was happy to enter into the term sheet, provided that he could terminate his relationship with GetSwift if he wanted to and that he was not committed to anything.[786] He nonetheless understood that the term sheet had legal effect,[787] and that, by entering into the term sheet with GetSwift, he had a contract in place that would allow him to use the GetSwift platform if the software met his expectations during the PMI trial.[788]

527 It was put to Mr Calleja that, provided that the platform met his expectations, he would in due course make deliveries using it, but Mr Calleja explained:

> Look, at that … point of the relationship there I was pretty much going to walk away from the whole thing, because I just felt like I was being made to do something I didn't want to do … my only interest was the storage and the warehousing side for Philip Morris.[789]

528 On 15 May 2017, Mr Macdonald sent an email to Mr Calleja (copied to Mr Hunter and Mr Metaxiotis), attaching a copy of the term sheet, countersigned by GetSwift (**CITO Agreement**).[790] In this covering email, Mr Macdonald stated, "[w]e note that you have marked out section 4. Term - Please realise that you wont be able to lock in a price guarantee with this section marked out."[791] In response, Mr Metaxiotis sent an email to Mr Macdonald (copied to Mr Hunter and Mr Calleja), in which he stated, "[b]ased upon our initial pilot phase of 3 months, the aim would be that we lock everything in with long term agreements for all parties".[792] The reference to the "3 month initial pilot phase" appears to echo Mr Metaxiotis' earlier email in which he informed Mr Macdonald that, in the context of FRF's pricing, "[t]he

[783] T602.9–10 (Day 8).
[784] T598.39 (Day 8); T608.23–25 (Day 8).
[785] T607.44–46 (Day 8).
[786] T602.33–35 (Day 8).
[787] T602.31 (Day 8).
[788] T602.23–24 (Day 8); T608.27–33 (Day 8).
[789] T608.1–6 (Day 8).
[790] GSWASIC00051623 attaching CITO Agreement (GSWASIC00059914); Calleja Affidavit (GSW.0009.0034.0001_R) at [36(b)], and [38].
[791] GSWASIC00045315.
[792] GSWASIC00045315.

absolute max period we could operate under this is 3 mths [*sic*]".[793] The reality was that PMI was only intending to operate under the term sheet arrangement for a maximum of three months, and that "long term agreements" were yet to be agreed.

GetSwift's engagement of FRF Couriers

529 On 15 May 2017, Mr Macdonald sent an email to Mr Brett Kennerley of FRF and informed him that PMI had agreed to the delivery rate of $12.50 and had chosen FRF as one of the preferred delivery partner options through the "GetSwift partner network".[794] In this email, Mr Macdonald stated:

> We already have an agreement in place with FRF so all we need to do to finalise the formalities is for FRF to sign the attached addendum document which basically protects the marketplace we are creating between FRF + GetSwift + Philip Morris (more clients to send your way shortly!)[795]

530 Between 15 May 2017 and 7 June 2017, Mr Macdonald negotiated the terms of the "Addendum" with FRF.[796] On 7 June 2017, Mr Kennerley sent an email to Mr Macdonald attaching the "Addendum" executed by FRF.[797] On the same day, Mr Macdonald sent an email to Mr Hunter forwarding his email correspondence with Mr Kennerley and the executed "Addendum".[798] Clause 3(a) of the Addendum provided:

> … the GetSwift platform and technology will be utilized by [FRF] when [FRF] provides delivery and related services for Philip Morris Limited and its affiliates (PML). PML has agreed separately to pay GetSwift directly for each delivery provided by [FRF] to PML. Upon receipt by GetSwift of such payments from PML, GetSwift will in turn pay to [FRF] an amount of $12.50 for each such delivery.[799]

531 On 13 June 2017, GetSwift released an announcement to the ASX entitled "FRF Couriers sign commercial agreement with GetSwift" in which it was stated "GetSwift … is pleased to announce that it has signed a commercial multi-year agreement with FRF Couriers".[800] This announcement was marked as "price sensitive" upon release to the market by the ASX.

[793] GSWASIC00020708.
[794] GSWASIC00018670 at 8676.
[795] GSWASIC00018670 at 8676.
[796] GSWASIC00018670.
[797] GSWASIC00018670 at 8670 attaching GSWASIC00018680.
[798] GSWASIC00018670 attaching GSWASIC00018680, and GSWASIC00018678.
[799] GSWASIC00018680 at 8680–8681.
[800] GSW.1001.0001.0587.

The CITO Announcement

532 The first draft of the CITO Announcement was prepared by Mr Hunter on 23 April 2017.[801] Mr Hunter subsequently sent Mr Macdonald revised versions of the draft announcement on 23 April 2017 and 28 April 2017.[802] At the time that these announcements were being drafted, the agreement with CITO had not yet been signed (as noted above, it was signed on 15 May 2017). On 21 May 2017, Mr Macdonald sent an email to Mr Mison (copied to Mr Hunter, Mr Eagle and Ms Gordon), in which he instructed Mr Mison, subject to any objections from the other board members, to submit the CITO Announcement to the ASX.[803] Mr Macdonald did not direct Mr Mison to release the CITO Announcement as price sensitive.

533 On 22 May 2017 at 9:55am, GetSwift submitted an announcement concerning the CITO Agreement to the ASX entitled "CITO Transport sign commercial agreement with GetSwift" (**CITO Announcement**).[804] The CITO Announcement stated that GetSwift "has signed an exclusive commercial multi-year agreement with CITO", and was marked as "price sensitive" upon release to the marked at 9:58am by the ASX.

534 On 22 May 2017, Mr Mison sent an email to Mr Hunter, Mr Macdonald, Ms Gordon and Mr Eagle attaching the CITO Announcement, in which he stated: "All, ASX Announcement released".[805] Mr Calleja did not have any communication with GetSwift in relation to the CITO Announcement before its release and had not seen a copy of it until a copy was shown to him by an officer of ASIC.[806]

535 Mr Calleja deposed that, as at 22 May 2017: (1) CITO had not been given access to the GetSwift Platform; (2) CITO and GetSwift had not yet undertaken any proof of concept, or trial, for the GetSwift Platform; (3) CITO had not made any deliveries using the GetSwift Platform; and (4) Mr Calleja had informed Mr Macdonald by email dated 10 April 2017 that CITO would not be making any deliveries using the GetSwift Platform.[807]

[801] GSWASIC00022121 attaching GSWASIC00022122.
[802] GSWASIC00022109 attaching GSWASIC00022110; GSWASIC00021378 attaching GSWASIC00045727.
[803] GSWASIC00051622 attaching GSWASIC00069433, and GSWASIC00069432.
[804] CITO Announcement (GSW.1001.0001.0583).
[805] GSWASIC00031188 attaching GSWASIC00031189.
[806] Calleja Affidavit (GSW.0009.0034.0001_R) at [41].
[807] Calleja Affidavit (GSW.0009.0034.0001_R) at [41].

CITO participation limited to provision of warehousing services

536 Consistent with the above evidence, Mr Calleja deposed that, since signing the term sheet, CITO had provided warehousing services to PMI. Documents obtained from CITO under subpoena show that PMI had agreed to pay CITO $12,000 for three months "storage rental space".[808] In his first affidavit, Mr Calleja set out the process for completing orders for PMI, including receiving PMI's orders by email from "Spire Store".[809] Mr Calleja said no part of the process involved use of, or access to, the GetSwift Platform, or communication between CITO and GetSwift.[810] Similarly, Mr Mark Jenkinson, CITO's Warehouse and Imports Manager at the time, explained in detail in his affidavit that throughout 2017 and 2018, CITO used its own software (named EDI) for the management of stock, inventory and warehousing arrangements, including for PMI.[811] He deposed that "[n]o part of the process … involved any software provided by, or branded, [GetSwift]".[812] In relation to the collection and delivery of PMI's goods, Mr Jenkinson stated that:

> CITO did not have any responsibility or involvement in arranging for FRF to pick up PMI's orders. There were two set times each day at which FRF attended CITO's warehouse to collect deliveries for PMI. If PMI's order was ready, the FRF driver collected them. If not, the FRF driver left the premises without any product. If an FRF driver did not show up for one of the daily set pick-up times, I usually contacted PMI to inform them of this but did not take any other action.[813]

537 Mr Calleja and Mr Jenkinson were not cross-examined in relation to this evidence.

Interview with Australasian Transport News

538 In late May 2017, Mr Macdonald asked Mr Calleja whether he would be prepared to be interviewed by the Australasian Transport News (**ATN**) regarding the relationship between CITO and GetSwift. Mr Calleja agreed to attend the interview.[814] He understood that the interview was going to be published in the ATN, which was read widely by persons within the transport industry.[815] Mr Calleja agreed that he was truthful in what he said to the journalist

[808] CITO.SUB.0001 at 5.
[809] Calleja Affidavit (GSW.0009.0034.0001_R) at [44].
[810] Calleja Affidavit (GSW.0009.0034.0001_R) at [44].
[811] Affidavit of Mark Alan Jenkinson (**Jenkinson Affidavit**) (GSW.0009.0045.0001) at [1], [8]–[14].
[812] Jenkinson Affidavit (GSW.0009.0045.0001) at [12].
[813] Jenkinson Affidavit (GSW.0009.0045.0001) at [14].
[814] T602.40–46 (Day 8). See also GSWASIC00044901.
[815] T604.15–19 (Day 8).

who interviewed him.[816] The journalist's notes of the interview with Mr Calleja were produced by the publishers of the ATN on subpoena.[817] The notes include the following passage:

> Why Swift: my main dealing is w Phillip Morris, the brand that's going to be moved to the platform, I'm an add-on to what they're doing**. I believe the tech they've put together is outstanding, being new tech I wanted to ensure I had my foot in the door** because I knew it could eventuate into something major and we would possibly guarantee our position in it all. I felt it was worthwhile to build this relationship [with GetSwift] and as I believe in their product.
>
> Once I saw what [GetSwift] was doing, I thought I could implement this into our services down the track.[818]

539 A ruling was made pursuant to s 136 of the *EA* in respect of these notes, limiting their use to the fact that the relevant representations recorded were made.[819]

540 Mr Calleja was cross-examined about whether the emphasised statements above reflected words that he likely said during the interview. His evidence was to the effect that while he could not remember the conversation with the journalist,[820] he did not deny that he said the things that were recorded in the notes.[821] Indeed, Mr Calleja agreed that the statements attributed to him in the parts of the journalist's notes to which he was taken in cross-examination accurately reflected his state of mind as at 2017.[822] An article about the interview with Mr Calleja was published in the ATN on 28 June 2017.[823] The contents of the article are consistent with the substance of the statements attributed to Mr Calleja in the journalist's notes of the interview.

541 On 3 July 2017, after the article was published online, Ms Hughan emailed a link to it to Mr Calleja and Mr Macdonald.[824] The article included the positive quotes attributed to Mr Calleja such as "we'll possibly look at putting all of our booking systems through this" and "I just want to have a look and see where this goes".[825]

[816] T604.21–22 (Day 8).
[817] BAU.001 (copies of the subpoenas are at GSWTB0037, and GSWTB0038).
[818] BAU.001 (emphasis added).
[819] T1039.45–1043.45 (Day 16).
[820] T606.31–32 (Day 8).
[821] T605.22–26 (Day 8); T606.19–21 (Day 8); T607.1–3 (Day 8).
[822] T606.34–36 (Day 8); T607.7–8 (Day 8).
[823] GSW.0003.0007.0521.
[824] GSW.0019.0001.5671.
[825] GSW.0003.0007.0521.

The alleged training

542 On 5 May 2017, Mr Metaxiotis sent an email to Mr Calleja.[826] In the email, Mr Metaxiotis proposed that PMI and CITO "move forward with the storage and pick pack option at [CITO's] warehouse in Tottenham" and suggested that he and Mr Calleja "touch base on [Monday] to iron out all the details and what we have to achieve over the course of next week to meet the deadline (i.e., training, stock mgmt. [*sic*], etc.)". Mr Calleja responded on 8 May 2017, copying Mr Jenkinson.[827] Mr Calleja informed Mr Metaxiotis in his email that Mr Jenkinson "will handle all warehousing related matters from here on".

543 On 9 May 2017, in response to a query from Mr Macdonald regarding the status of the agreement with CITO, Mr Metaxiotis asked Mr Macdonald: "From his end what level of 'training' will there need to be … What sort of time do I need to lock him away?"[828] On 10 May 2017, Mr Metaxiotis wrote to Mr Jenkinson, attaching a copy of the GetSwift term sheet for signing by Mr Calleja, and noting that GetSwift's "training on how to use the system takes about an hour max" and asking Mr Metaxiotis then asked Mr Jenkinson what time would suit him for the training.[829]

544 Mr Jenkinson replied to Mr Metaxiotis' email that afternoon (copied to Mr Calleja), attaching the executed term sheet which had been signed by Mr Calleja, and stating: "Software training can take place Tuesday 16th, mid-morning is preferable".[830]

545 Pausing briefly here, in cross-examination, Mr Calleja was taken to this email. It was put to Mr Calleja that the software training was for the GetSwift system, but Mr Calleja explained:

> I can't be sure that that's what software he was taking about because we never used that software. We used another software called Spire.[831]

546 In re-examination, Mr Calleja said further that:

> From my understanding, we only dealt with the Spire software. That's … all I ever saw, that's what I remembered, that's what the labels … were coming from … The

[826] CITO.SUB.0001 at 0005.
[827] CITO.SUB.0001 at 0004.
[828] GSWASIC00045367.
[829] CITO.SUB.0001 at 0002.
[830] CITO.SUB.0001 attaching GSWASIC00045367.
[831] T609.3–8 (Day 8); T609.40–610.9 (Day 8).

labels that we would put on the packaging were from the Spire system.[832]

547 In his affidavit, Mr Calleja deposed that CITO received orders for PMI stock by email from "Spire Store".[833]

548 However, GetSwift contends that Mr Calleja's evidence about training on "Spire software" appears to be confused. It says there was in fact no such thing as "Spire software" ("Spire" being the name of the entity which PMI used to sell its products online).[834] In the second half of 2017, Spire sent to CITO by email text files which contained "picking lists" for the stock which had to be sorted in CITO's warehouse for delivery to PMI's customers.[835] Mr Jenkinson and his assistants would copy the text from Spire's picking lists and use CITO's printing machine to print labels, which were then stuck on the cartons of stock to be delivered.[836] Since the only software that Mr Jenkinson used in connexion with Spire was the "EDI" (later renamed "CargoWise") software, which CITO had been using since 2013,[837] GetSwift says that there would have been no need for Mr Jenkinson or anyone else at CITO to have undertaken training in relation to the EDI software, with which they were already familiar.

549 Following Mr Jenkinson's response to Mr Metaxiotis' email on 10 May 2017, Mr Metaxiotis forwarded the signed term sheet to Mr Macdonald.[838] Mr Metaxiotis advised Mr Macdonald that "[s]oftware training can take place Tuesday 16th next week, mid-morning is preferable for them". He then stated that Mr Macdonald's team could "make direct contact for arrangements with Mark Jenkinson (Warehouse/Imports Manager)" and set out Mr Jenkinson's email address and telephone number.[839]

550 On 12 May 2017, Mr Metaxiotis sent an email to Mr Jenkinson, copying Mr Calleja.[840] Mr Metaxiotis stated, relevantly:

Hi Mark – tried to catch you a couple of time [*sic*] but only have office number and

[832] T621.10–16 (Day 8).
[833] Calleja Affidavit (GSW.0009.0034.0001_R) at [44(b)].
[834] Jenkinson Affidavit (GSW.0009.0045.0001) at [11].
[835] Jenkinson Affidavit (GSW.0009.0045.0001) at [10]; see GSW.0020.0001.0004 for an example of an email attaching a picking list.
[836] Jenkinson Affidavit (GSW.0009.0045.0001) at [10].
[837] Jenkinson Affidavit (GSW.0009.0045.0001) at [8].
[838] GSWASIC00045367.
[839] GSWASIC00045367.
[840] CITO.002 at 2.

> bounced around a few times.
>
> Please [see] below for my suggested timeline of key activities for next week and give me a call if you have any Q's (otherwise email response will do):
>
> …
>
> **Tuesday 16th (morning)**
>
> GetSwift training on system[841]

551 Mr Jenkinson replied to Mr Metaxiotis' email on 15 May 2017, stating, "[t]omorrow morning is possible, let's aim for 10am".[842] Later that afternoon at 1:35pm, Mr Metaxiotis sent an email to Mr Macdonald,[843] enquiring whether he was "good for someone to train their warehouse manager tomorrow at 10am on their premises[?]". Mr Macdonald responded at 2:47pm, stating:

> Yes Steph can do demo tomorrow online for the warehouse manager.
>
> What are their details please?
>
> Steph can set up and send an invite for online URL to join the demo for them.[844]

552 On 16 May 2017, Ms Stephanie Noot of GetSwift sent an email to Ms Gordon with the subject line "PMI/Cito", stating: "I had a demo with PMI/Cito earlier".[845] On the same day, at 12:45pm, Mr Metaxiotis wrote to Mr Macdonald, stating: "Hi Joel – session overall was a success with some context provided [from] our end to [CITO]".[846]

553 Counsel for GetSwift took both Mr Calleja and Mr Jenkinson to this email. When asked in cross-examination whether, having seen an email from Mr Metaxiotis dated 16 May 2017, he accepted that it was likely he did receive training on the GetSwift system, even though he now no longer remembers it, Mr Jenkinson replied: "No, I don't believe it was likely".[847]

554 Moreover, after being shown an email from Stephanie Noot to Ms Gordon dated 16 May 2017, Mr Jenkinson was asked "[a]nd you recall now, having seen that email, that you did in fact have some training with GetSwift in relation to its system on 16 May 2017?", to which he

[841] CITO.002 at 2 (emphasis added).
[842] CITO.002.
[843] GSWASIC00019568 at 9569.
[844] GSWASIC00019568 at 9568.
[845] GSWASIC00045263.
[846] GSWASIC00019568.
[847] T627.42–44 (Day 8).

replied "[n]o, I do not".[848] The question was then repeated in this way, "[y]ou would accept it's entirely possible, isn't it, having seen those emails, that you did receive some training, you just don't remember it anymore?", to which Mr Jenkinson replied, "[n]o. I'm pretty sure I would remember if I received training".[849] When I asked "Why is that? Do you have any particular basis for saying why you don't accept that?", Mr Jenkinson replied, "Because we never used it. It was never part of what I was using or was required to use".[850]

555 Further, when asked in cross-examination whether it was possible that it was contemplated at this stage that he would use the system and that he received some training on it even if he never actually did use the system, Mr Jenkinson was firm, "No, it's not possible".[851] Further, when asked in cross- examination whether the name Stephanie Noot rings a bell, Mr Jenkinson was emphatic: "Absolutely not".[852]

556 Mr Calleja deposed that he did not attend or participate in any software training involving anyone at GetSwift or GetSwift's platform,[853] although he did accept in cross-examination, that he was not in a position to confirm one way or the other whether any training did in fact take place, which would follow as a matter of logic given he could not speak of interactions with persons other than him.[854] But Mr Jenkinson also deposed that he did not recall ever receiving any training or demonstration from anyone in relation to any platform or software owned or operated by GetSwift and that to his knowledge, no one at CITO received training in the GetSwift Platform.[855] He was also never asked to install any GetSwift software or to access any GetSwift website.[856] Mr Jenkinson said in cross-examination that he recalled receiving training in relation to putting boxes into certain types of cartons, but did not recall receiving any online training.[857]

[848] T628.22–23 (Day 8).
[849] T628.31–33 (Day 8).
[850] T626.30–32 (Day 8).
[851] T626.34–36 (Day 8).
[852] T627.25 (Day 8).
[853] Affidavit of Paul Simon Calleja affirmed 29 May 2020 (**Supplementary Calleja Affidavit**) (GSW.0009.0034.0088) at [5].
[854] T616.33–36 (Day 8).
[855] Jenkinson Affidavit (GSW.0009.0045.0001) at [6]–[7].
[856] Jenkinson Affidavit (GSW.0009.0045.0001) at [12].
[857] T623.44–47 (Day 8).

557 GetSwift suggests that Mr Jenkinson's memory is unreliable because he could not recall sending a term sheet to Mr Metaxiotis on 10 May 2017,[858] despite having been taken to the relevant email in cross-examination.[859] However, Mr Jenkinson deposed in his affidavit that the negotiation of contractual arrangements was not an area of the business in which he was typically involved.[860]

558 As to whether training took place remained a matter in dispute between the parties. I will return to this evidence below in determining whether the alleged training took place.

The alleged trial of the PMI online store giving CITO access to the GetSwift Platform

559 In further defence of the contents of the CITO Announcement, GetSwift alleges that in June 2017, as part of a four-way partnership to launch PMI's e-commerce solution, CITO, GetSwift, PMI and FRF conducted a trial of the PMI online store, which gave CITO access to the GetSwift Platform. Mr Calleja deposed that CITO did not at any time have access to GetSwift's platform and that he does not recall participating in any trial of any GetSwift software conducted in June 2017 or at any other time.[861] Mr Jenkinson deposed that he was not given access to the GetSwift Platform for any trial or for any other reason and that he was also never given access to PMI's online store for the purposes of conducting any trial.[862] Further, he deposed that since late June 2017, he had not had any contact with Mr Macdonald or any other representative of GetSwift.[863]

G.1.6 *Hungry Harvest LLC*

560 Hungry Harvest LLC (**Hungry Harvest**) operated a fresh fruit and vegetable delivery business in selected states on the east coast of the United States.[864]

[858] CITO.SUB.0001.
[859] T625.13–18 (Day 8).
[860] Jenkinson Affidavit (GSW.0009.0045.0001) at [4].
[861] Supplementary Calleja Affidavit (GSW.0009.0034.0088) at [7].
[862] Jenkinson Affidavit (GSW.0009.0045.0001) at [16].
[863] Calleja Affidavit (GSW.0009.0034.0001_R) at [50].
[864] GSWASIC00044903.

Negotiation of the Hungry Harvest Agreement

561 As indicated by the below emails, the Hungry Harvest Agreement was negotiated between Mr Adam Tott (Logistics Manager for Hungry Harvest) and Mr Macdonald (on behalf of GetSwift).

562 On 27 April 2017, Mr Macdonald sent an email to Mr Tott, requesting that he provide Hungry Harvest's "worst, best and future volume tiering" so Mr Macdonald could prepare and send Mr Tott a "1 page term sheet".[865] Mr Tott replied to this email later that day.[866] On 1 May 2017, Mr Macdonald sent Mr Tott an email attaching a term sheet for his review.[867] In relation to the draft term sheet, Mr Macdonald stated: This includes a 30 day free trial to make sure GetSwift is the right fit for you.[868]

563 On 3 and 4 May 2017, Mr Macdonald and Mr Tott negotiated, via email, the proposed cost per delivery that Hungry Harvest was to be charged by GetSwift for using the GetSwift Platform.[869] On 4 May 2017, Mr Tott sent a further email to Mr Macdonald regarding the term of the proposed agreement between Hungry Harvest and GetSwift, and the length of the trial period offered by GetSwift.[870] In this email, Mr Tott stated:

> Just had 1 last question and 1 last request. The question is what exactly are the customary terms of the contract? per the last paragraph, "The balance of the terms of this arrangement shall be in accordance with GetSwift's customary terms and conditions for agreements of this type (e.g., termination, confidentiality, representations and warranties, indemnification, IP ownership, non-solicitation, etc.) and the parties contemplate entering into a more formal agreement containing such additional terms and conditions, subject to good faith negotiations. Until such time, if ever, as such more formal agreement is entered into, this Term Sheet shall constitute a binding agreement between the parties with regard to the matters set forth herein." Just looking for a little more detail on that since this is a 3 year agreement.
>
> The request is we will need the 1 month trial period to begin after we have DBP and GetSwift fully integrated with each other. This could take a couple of days to a couple of weeks even up to a month and we want to be able to do testing during the trial period and that will need to be done after integration.[871]

[865] GSWASIC00045605 at 5607.
[866] GSWASIC00045605 at 5607.
[867] GSWASIC00045605 at 5606 attaching GSWASIC00045621.
[868] GSWASIC00045605 at 5606.
[869] GSWASIC00045605 at 5605–5606.
[870] GSWASIC00045605.
[871] GSWASIC00045605.

564 On 5 May 2017, Mr Macdonald sent an email to Mr Tott attaching a revised draft term sheet.[872] In this email, Mr Macdonald stated, "[a]s you will need some time to integrate - what we have done is extended the trial period until July 1st. We can't offer 2 free months so have included 30 days free during this period."[873]

565 On or around 22 May 2017, Mr Tott signed the term sheet with GetSwift.[874] GetSwift and Hungry Harvest thereby entered into an agreement, in which Hungry Harvest agreed, among other things, to use GetSwift's services for an initial trial period expiring on 1 July 2017 (**Hungry Harvest Agreement**).[875] Following the trial period, an "initial term" of 36 months would commence unless Hungry Harvest gave notice, at least seven days prior to the expiration of the trial period that it did not wish to continue with the agreement.[876]

566 The signed Hungry Harvest Agreement produced by GetSwift to ASIC contains redactions over the portion of the document relating to the fees payable under the agreement in clause 5. There is, therefore, no evidence of the amount Hungry Harvest agreed to pay per delivery under the Hungry Harvest Agreement.

567 On 30 May 2017, Mr Macdonald sent a copy of the Hungry Harvest Agreement to Stephanie Noot, Ms Cox and Mr Hunter.[877]

Preparation of the Hungry Harvest Announcement

568 On 31 May 2017 at 10:58pm, Mr Hunter sent an email to Mr Macdonald attaching a draft announcement regarding GetSwift's entry into the Hungry Harvest Agreement.[878] The subject line of this email stated: "Review then lets [*sic*] send out - we need to continue the dialogue w the market".[879] At 1:48am, Mr Macdonald responded to Mr Hunter's email, attaching an

[872] GSWASIC00045605 attaching GSWASIC00045609.
[873] GSWASIC00045605.
[874] GSWASIC00045060 (Rather than an attachment, the term sheet was signed electronically by Mr Tott, using 'DocuSign').
[875] Hungry Harvest Agreement (GSWASIC00045013); Agreed Background Facts (GSW.0002.0002.0001) at [53].
[876] Hungry Harvest Agreement (GSWASIC00045013); Agreed Background Facts (GSW.0002.0002.0001) at [53].
[877] GSWASIC00057938 attaching Hungry Harvest Agreement (GSWASIC00045013).
[878] GSWASIC00071009 attaching GSWASIC00071010.
[879] GSWASIC00071009.

updated draft announcement and stated, "Ok looks good. Made a couple of minor changes but please read to make sure you are still ok. I will send it out."[880]

569 At 6:01am, Mr Macdonald sent an email to Mr Mison, copied to Mr Hunter, Mr Eagle, and Ms Gordon, attaching the draft Hungry Harvest Announcement, in which he stated, "[c]an you please format & release this before market as long as there are no objections from anyone from the board prior to 930am?"[881] Mr Macdonald did not direct Mr Mison to ask the ASX to mark the Hungry Harvest Announcement as price sensitive.

570 At 7:59am, Mr Mison sent an email to Mr Macdonald, copied to Mr Hunter, Mr Eagle, and Ms Gordon, attaching an updated draft Hungry Harvest announcement.[882] At 8:04am, Mr Macdonald sent a further email to Mr Mison requesting a further change to the draft Hungry Harvest announcement, stating "one edit needed: please change Philly to Philadelphia".[883] At 8:59am, Mr Mison sent an email to Mr Macdonald attaching a further updated version of the Hungry Harvest announcement and noting, "I will release at 9.30."[884] Mr Eagle sent an email, making one further suggestion: "all, one minor comment if not too late to change – Jon Hopkins has an 's' in Johns".[885]

571 At 9:11am, Mr Macdonald sent an email to Mr Tott informing him that GetSwift would be submitting an announcement to the ASX concerning the Hungry Harvest Agreement. In this email, Mr Macdonald stated:

> Just a quick heads up from our end and as a minor procedural issue, we are required by law to submit a release to the ASX (Australian Stock [*sic*] Exchange) that our two companies have entered into an agreement together. This will be sent off shortly as part of our regulatory compliance requirements for being a publicly traded company.[886]

572 At 9:26am, GetSwift submitted, and the ASX released, an announcement concerning the Hungry Harvest Agreement (**Hungry Harvest Announcement**).[887] The ASX, released the

[880] GSWASIC00071008.
[881] GSWASIC00057937 attaching GSWASIC00044937.
[882] GSWASIC00057918 attaching GSWASIC00044908.
[883] GSWASIC00059888.
[884] GSWASIC00059888 attaching GSWASIC00059890.
[885] GSWASIC00044905.
[886] GSWASIC00044920 (the email did not attach a draft of the announcement).
[887] Hungry Harvest Announcement (GSW.1001.0001.0585).

announcement as "price sensitive" on the same day at 9:28am.[888] The Hungry Harvest Announcement, which was marked price sensitive, relevantly stated that GetSwift had "signed an exclusive multiyear partnership with Hungry Harvest in the USA."[889] At 9:29am, Mr Mison forwarded confirmation of the ASX release to Mr Hunter, Mr Macdonald, Mr Eagle and Ms Gordon.[890]

G.1.7 *The First Placement*

Trading Halt

573 At 8:46am on 21 August 2017, Mr Mison sent an email to the email address "Companies_Sydney@asx.com.au", (copied to Mr Eagle) attaching a request for GetSwift's shares to be placed in a trading halt.[891]

574 At 9:12am, Mr Andrew Kabega, Senior Adviser, Listings Compliance (Sydney) at the ASX, sent an email to Mr Mison (copied to Mr Eagle), stating:

> As per our phone discussion, paragraph 3.6 of Guidance Note 16 provides guidance as to the procedure that a listed entity should use when seeking for a trading halt on the ASX.
>
> ASX will require a written request for a trading halt to include the information specified under Listing Rule 17.1, that is:
>
> 1. the entity's reasons for the trading halt,
> 2. how long it wants the trading halt to last,
> 3. the event it expects to happen that will end the trading halt; and
> 4. that it is not aware of any reason why the trading halt should not be granted.
>
> Please note that in the Company's case, the acceptable reason for the trading halt, will be "pending an announcement about a proposed capital raising".[892]

575 At 9:18am, Mr Eagle sent an email to Mr Kabega (copied to Mr Mison) regarding the procedure listed entities should follow when seeking a trading halt. In this email, Mr Eagle stated:

> Per our conversation you understand the reasons why we were not wanting to refer to any capital raising in the announcement that went public. Based on our conversation

[888] Agreed Background Facts (GSW.0002.0002.0001) at [54].
[889] Hungry Harvest Announcement (GSW.1001.0001.0585).
[890] GSWASIC00044902 attaching GSWASIC00044903.
[891] GSWASIC00051517 at 1518.
[892] GSWASIC00051517.

> and your email I have instructed our company secretary to resend our written request with the reason stated as per your reference below. I trust this is now acceptable.[893]

576 At 9:18am, Mr Mison sent an email to Mr Kabega, copied to Mr Eagle and "Companies_Sydney@asx.com.au", attaching a letter dated 21 June 2017 requesting that GetSwift's shares be placed in a trading halt pursuant to rule 17.1 of the ASX Rules, pending an announcement regarding a capital raising.[894]

577 At 9:36am, the ASX published a market announcement entitled "Trading Halt" which stated that, at the request of the company, GetSwift securities would be placed in a trading halt, pending the release of an announcement by the company (**First Placement Trading Halt Announcement**).[895]

Tranche 1 Placement

578 On 23 June 2017, GetSwift submitted to the ASX, and shortly thereafter the ASX released, an announcement that stated that GetSwift had raised "A$24M from a combination of new USA and Australian investors" and would "issue 30,090,540 shares at A$0.80 per share in a two-tranche equity placement" using GetSwift's existing placement capacity (**First Placement Completion Announcement**).[896]

579 At 8:55am, Mr Mison sent an email to Messrs Hunter, Macdonald and Eagle and Ms Gordon forwarding the confirmation that the First Placement Completion Announcement had been released by the ASX.[897]

580 On 3 July 2017 at 7:11pm, Mr Mison sent an email to Messrs Hunter, Macdonald and Eagle and Ms Gordon attaching a draft announcement concerning the Tranche 1 placement and a draft Appendix 3B and cleansing notice.[898] Mr Mison asked the directors to "[p]lease review and let me know if you have any comment/queries on the documents". The draft announcement stated, among other things:

> The company has issued 13,808,932 shares at A$0.80 per share to raise $11.047m using the Company's existing placement capacity under ASX Listing Rule 7.1. An

[893] GSWASIC00051517.
[894] GSWASIC00051513 attaching GSWASIC00051515.
[895] First Placement Trading Halt Announcement (GSW.1001.0001.0588).
[896] First Placement Completion Announcement (GSW.1001.0001.0591).
[897] GSWASIC00029992 attaching GSWASIC00029993.
[898] GSWASIC00017329 attaching GSWASIC00017330, and GSWASIC00017332.

Appendix 3B is following.

Notice under sections 708A(5)(e) of the Corporations Act 2001

This notice is given by GetSwift Limited ("**Issuer**") under section 708A(5)(e) of the Corporations Act 2001 ("**Act**").

The Issuer today issued 13,808,932 fully paid ordinary shares ("**Share**") at an issue price of A$0.80 per Share to institutional and professional investors under the institutional placement announced on 23 June 2017

The Issuer advises that:

(a) the Shares were issued without disclosure to investors under Part 6D.2 of the Act;

(b) this notice is being given under sections 708A(5)(e) of the Act;

(c) as a disclosing entity, the Issuer is subject to regular reporting and disclosure obligations;

(d) as at the date of this notice, the Issuer has complied with:

(i) the provisions of Chapter 2M of the Act, as they apply to the Issuer; and

(ii) section 674 of the Act; and

(e) as at the date of this notice, there is no information that is 'excluded information' within the meanings of sections 708A(7) and 708A(8) of the Act.[899]

581 At 7:52pm, Ms Gordon sent an email to Mr Mison (and others), in which she stated "I have a few questions around the attached. Could you please let me know when you have a few minutes to discuss".[900] Mr Hunter sent an email to Ms Gordon in response stating, "Jamila please crosscheck w [*sic*] Brett or myself first please. Scott is tasked with some tight deadlines."[901] Mr Eagle subsequently replied, stating "Great, thanks Scott".[902]

582 On 4 July 2017, at 4:53pm, Mr Mison sent an email to Mr Hunter, Mr Macdonald, Mr Eagle and Ms Gordon, attaching a final Appendix 3B and cleansing notice.[903] In this email, Mr Mison stated:

We have now had conformation [*sic*] from Computershare that the manual allotment

[899] GSWASIC00017330 (emphasis in original).
[900] GSWASIC00017291.
[901] GSWASIC00017291.
[902] GSWASIC00017266.
[903] GSWASIC00057747 attaching GSWASIC00052881.

> is completed. Please find attached final cleansing notice and 3B. I wil1 lodge in next 10mins if no objection.[904]

583 At 4:59pm, GetSwift submitted to the ASX, and at 5pm the ASX released, an announcement entitled "Tranche 1 Placement Completed - Appendix 3B and Cleansing Notice" (**Tranche 1 Cleansing Notice**).[905] The Tranche 1 Cleansing Notice stated that it was issued as a notice pursuant to s 708A(5)(e) of the *Corporations Act* and, among other things, that GetSwift had complied with s 674 of the *Corporations Act*.

584 The First Placement Completion Announcement also stated that GetSwift:

(1) had completed a successful capital commitment raising of A$24M from a combination of new USA and Australian investors, as well as strong support from existing institutional investors; and

(2) would issue 30,090,540 shares at A$0.80 per share in a two-tranche equity placement, using the Company's existing placement capacity under ASX Listing Rule 7.1 of 13,809,451 shares with the additional capacity to remain subject to shareholder approval at the EGM.

585 On 4 July 2017, GetSwift issued 13,808,932 shares at $0.80 per share to raise $11,047,145.60.

586 At 5:03pm, Mr Mison sent an email to Messrs Hunter, Macdonald and Eagle and Ms Gordon, forwarding the confirmation that the Tranche 1 Cleansing Notice had been released by the ASX.[906]

Tranche 2 Placement

587 On 14 August 2017 at 1:26pm, Mr Mison sent an email to Mr Hunter, Mr Macdonald, Mr Eagle and Ms Gordon attaching a draft announcement concerning the tranche 2 placement and a draft Appendix 3B and cleansing notice.[907] In this email, Mr Mison stated:

> In anticipation of the finalisation of the tranche 2 shares, please find attached an announcement and cleansing statement for the Tranche 2 shares and an Appendix 3B for both the shares under tranche 2 and Director options approved by shareholders.

[904] GSWASIC00057747.
[905] Tranche 1 Cleansing Notice (GSW.1001.0001.0593); Agreed Background Facts (GSW.0002.0002.0001) at [104].
[906] GSWASIC00017268 attaching GSWASIC00017269.
[907] GSWASIC00057231 attaching GSWASIC00057232, and GSWASIC00057234.

> Please let me know if you have any queries / comments on the releases.
>
> Procedures from here:
>
> - We are currently awaiting funds for final allotment.
> - Once we have received we can have a quick call with all directors to issue all the shares as part of tranche 2. We can also approved the issue of options to directors that were approved and is part of the appendix 3B.
> - Once approved by directors I can instruct Computershare to allot bot [*sic*] the DVP shares and manual shares.
> - Once the shares are allotted I can release the attached Appendix 3B and cleansing statement to the ASX.[908]

588 At 6:02pm, Ms Gordon sent an email to Mr Hunter, Mr Macdonald, Mr Eagle and Mr Mison regarding the proposed waiver of the 12 month delay in performance rights vesting for directors, stating: The email stated:

> [T]there was no vote taken on the matter of waiving the 12 month delay in performance rights vesting. There was an email from Brett on this topic and a email back from Joel. I have not seen anything from Bane on this topic, and I requested a board meeting to discuss this along with other issues over the weekend. This meeting has not been held. …[909]

589 At 6:54pm, Mr Hunter sent an email to Ms Gordon in response to her query, in which he stated:

> Can you please answer my previous email stating the reasons based on facts and not just opinions? This is a procedural issue nothing else. If you feel you cannot operate within the constraints and speed required that the company needs please let the board know. This is very last minute and you are not giving us factual reasons. If anything it seems obstructionist [*sic*]. So for the last time what are your specific objections other than just the blanket statement that it would not be in the best interest of shareholders. Define this.[910]

590 At 7:10pm, Ms Gordon replied, stating:

> The question is back to you: what is the rationale for considering waiving the 12 month delay on the performance rights in the first place?
>
> I am being asked to vote on something for which no argument has been put forward.[911]

[908] GSWASIC00057231.
[909] GSWASIC00031803_R at 1804_R.
[910] GSWASIC00031803_R at 1803_R.
[911] GSWASIC00031803_R at 1803_R.

591 At 11:30pm, Mr Hunter replied to this email thread, requesting Mr Mison (copied to Ms Gordon, Mr Macdonald and Mr Eagle): "Please do not release the performance share notification right now. We have to sort out the board structure first. File the 3b of course".[912]

592 On 15 August 2017, Mr Eagle sent an email to Mr Mison (copied to Mr Hunter, Mr Macdonald and Ms Gordon), replying to Mr Mison's original email sent on 14 August 2017 at 1:26pm. stating:

> No comments my side on these docs. As we are holding off on the performance rights question, good to go from my side. Thanks Scott.[913]

593 On 15 August 2017, GetSwift issued 16,281,608 shares at $0.80 per share to raise $13,025,286.40.[914]

594 On 16 August 2017, at 9:46am, GetSwift submitted to the ASX and, at 9:49am, the ASX released an announcement entitled "Tranche 2 Placement Completed - Appendix 3B and Cleansing Notice" (**Tranche 2 Cleansing Notice**).[915] The Tranche 2 Cleansing Notice stated that it was issued as a notice pursuant to s 708A(5)(e) of the *Corporations Act* and, among other things, that GetSwift had complied with s 674 of the *Corporations Act*. At 9:51am, Mr Mison sent an email to Messrs Hunter, Macdonald and Eagle and Ms Gordon forwarding the confirmation email that the Tranche 2 Cleansing Notice had been released by the ASX.[916]

G.1.8 *Fantastic Furniture*

595 FHL Distribution Centre Pty Ltd (**Fantastic Furniture**) co-ordinates the supply chain logistics of warehousing, despatch and delivery of furniture from Fantastic Furniture factories and distribution centres to its retail stores and home delivery customers across Australia.[917] Fantastic Furniture is part of the group of companies whose parent company in Australia is

[912] GSWASIC00031803_R at 1803_R.
[913] GSWASIC00057196.
[914] Agreed Background Facts (GSW.0002.0002.0001) at [107].
[915] Tranche 2 Cleansing Notice (GSW.1001.0001.0755).
[916] GSWASIC00029162 attaching GSWASIC00029163.
[917] Affidavit of Abdulah Jaafar affirmed 23 September 2019 (**Jaafar Affidavit**) (GSW.0009.0004.0001_R) at [5].

Greenlit Brands Pty Limited, a household and general merchandise manufacturer and retailer that includes the Fantastic Furniture, Freedom Furniture, Snooze and Best & Less brands.[918]

Initial dealings and negotiation of the Fantastic Furniture Agreement

596 In the first half of 2017, Mr Abdul David Halliday ah Jaafar, Fantastic Furniture's General Manager of Supply Chain and Quality Assurance, requested that Mr Nguyen, a Supply Chain Analyst, review the delivery management software platforms that Fantastic Furniture's third-party logistics providers were using for the delivery of goods and its customers.[919]

597 In mid-2017, Fantastic Furniture commenced a review of its "Online Home Delivery" strategy, which considered how the company could optimise the delivery of Fantastic Furniture merchandise from its Fairfield distribution centre to its home delivery customers.[920] The review involved the evaluation of different options, including "track and trace" type systems, and last-mile delivery solutions (i.e. the movement of goods from the Fairfield distribution centre directly to the home delivery customer, bypassing delivery from the Fantastic Furniture store to the customer). The process Fantastic Furniture undertook was to test different types of software delivery platforms.[921]

598 In early-June 2017, Mr Nguyen had a discussion with Mr Kahlert, the general manager of APT, who at the time was one of Fantastic Furniture's third-party logistic providers.[922] Mr Kahlert told Mr Nguyen that APT's delivery drivers were using a software product supplied by GetSwift for deliveries performed for one of APT's customers.[923] Mr Kahlert demonstrated the GetSwift software solution to Mr Nguyen and how it operated in real-time.[924] Apparently Mr Kahlert also spoke positively to Mr Jaafar about GetSwift's software and recommended them as a good company.[925]

[918] Affidavit of Simon Nguyen affirmed 26 September 2019 (**Nguyen Affidavit**) (GSW.0009.0037.0001_R) at [6].
[919] Nguyen Affidavit (GSW.0009.0037.0001_R) at [8]–[9].
[920] Jaafar Affidavit (GSW.0009.0004.0001_R) at [9].
[921] Jaafar Affidavit (GSW.0009.0004.0001_R) at [9]; Nguyen Affidavit (GSW.0009.0037.0001_R) at [8].
[922] T642.36–43 (Day 9).
[923] Nguyen Affidavit (GSW.0009.0037.0001_R) at [9]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [11]–[12].
[924] T643.6–36 (Day 9).
[925] T653.16–22 (Day 9).

599 On 9 June 2017, Mr Kahlert sent an email to Mr Macdonald, introducing Mr Nguyen.[926] Om 10 June 2017, Mr Macdonald emailed Mr Nguyen suggesting they have a discussion on how GetSwift could support Fantastic Furniture.[927] Mr Macdonald and Mr Nguyen subsequently made arrangements for Mr Macdonald to provide a live demonstration of the GetSwift delivery tracking software to Fantastic Furniture via WebEx (an online video conferencing platform).[928] That call occurred on 21 June 2017, and Mr Nguyen, Mr Macdonald and Mr Paul Ybanez, Fantastic Furniture Supply Chain Analyst, participated.[929] During the call, Mr Macdonald explained the capabilities of the GetSwift delivery tracking software and conducted a demonstration of the software, showing the type of communication that occurs with a customer during the delivery process.[930] At the end of the demonstration, Mr Nguyen told Mr Macdonald that he would "be happy to trial it".[931] Mr Nguyen was impressed with the software solution and recognised it had various capabilities that Fantastic Furniture's software did not have.[932] Mr Macdonald told Mr Nguyen that GetSwift had a 30-day trial period and if Fantastic Furniture were to continue after the trial then Fantastic Furniture would be locked into a contract, a draft of which Mr MacDonald said he would send Mr Nguyen.[933]

600 On 22 June 2017, Mr Macdonald sent an email to Mr Nguyen outlining that GetSwift was in the final stages of drafting a one page term sheet for Fantastic Furniture to review and requested that Mr Nguyen provide further details, including monthly delivery volumes.[934] On 3 July 2017, Mr Nguyen sent an email to Mr Macdonald containing this information (including estimated volumes with respect to various counterfactuals, with a normal case scenario being 1,143 deliveries per month for online sales delivered from the NSW warehouse and with the potential for an additional 3,600 deliveries per month from stores).[935]

[926] GSWASIC00018605.
[927] GSWASIC00018605; Nguyen Affidavit (GSW.0009.0037.0001_R) at [10].
[928] Nguyen Affidavit (GSW.0009.0037.0001_R) at [11].
[929] Nguyen Affidavit (GSW.0009.0037.0001_R) at [12].
[930] Nguyen Affidavit (GSW.0009.0037.0001_R) at [12].
[931] Nguyen Affidavit (GSW.0009.0037.0001_R) at [12]; T643.38–645.21 (Day 9).
[932] Nguyen Affidavit (GSW.0009.0037.0001_R) at [12]; T643.38–645.21 (Day 9).
[933] Nguyen Affidavit (GSW.0009.0037.0001_R) at [12].
[934] GSW.1012.0001.0016 at 0018.
[935] GSW.1012.0001.0016; Nguyen Affidavit (GSW.0009.0037.0001_R) at [14].

601 On 6 July 2017, Mr Macdonald sent an email to Mr Nguyen (copied to Mr Hunter and Mr Clothier of GetSwift) attaching a document entitled "Term Sheet".[936] In this email, Mr Macdonald stated:

> I am attaching our standard term sheet which highlights your trial period expiring September 1st and then follow on indicative discount pricing schedule. If you could kindly sign this and return we can then begin working towards the trial start date[937]

602 On the same day, Mr Nguyen provided a copy of the draft term sheet to Mr Jaafar for his review and asked for his approval to commence a trial for the GetSwift delivery tracking software.[938] Some clarification was also sought on 14 July 2017, with respect to delivery costs as referred to in the draft term sheet.[939]

603 At some point between 6 and 24 July 2017, Mr Nguyen and Mr Jaafar had a conversation about the timing of the trial of the GetSwift Platform, in which they agreed that Mr Nguyen would contact GetSwift to arrange for it to provide him with a revised term sheet specifying a 30-day trial period expiring on 1 October 2017, rather than on 1 September 2017.[940] This was because, among other things, Fantastic Furniture, at that time, had undertaken another project that was a priority and which required Mr Nguyen's attention.[941]

604 On about 24 July 2017, Mr Nguyen called Mr Clothier and requested that GetSwift provide a revised draft term sheet with a trial period ending on 1 October 2017. Mr Clothier told Mr Nguyen to simply change the dates on the draft term sheet by hand and return a marked-up term sheet.[942] Between 24 and 26 July 2017, Mr Nguyen relayed Mr Clothier's instructions to Mr Jaafar, who made the changes to the term sheet in handwriting, signed it on behalf of Fantastic Furniture, and gave the document to Mr Nguyen to send to GetSwift.[943] Mr Jaafar told Mr Nguyen that it should be made clear to GetSwift that Fantastic Furniture was only

[936] GSW.1012.0001.0016 attaching GSW.1012.0001.0020.
[937] GSW.1012.0001.0016.
[938] Nguyen Affidavit (GSW.0009.0037.0001_R) at [16]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [14].
[939] GSWASIC00016241; Nguyen Affidavit (GSW.0009.0037.0001_R) at [17].
[940] Nguyen Affidavit (GSW.0009.0037.0001_R) at [18]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [16].
[941] Nguyen Affidavit (GSW.0009.0037.0001_R) at [18]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [16].
[942] Nguyen Affidavit (GSW.0009.0037.0001_R) at [19]; GSWASIC00015106 at 5107.
[943] Nguyen Affidavit (GSW.0009.0037.0001_R) at [20]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [18]–[19].

interested in a trial period at that stage, and that a meeting be arranged two weeks before the trial expiry date to discuss the next steps and phases.[944]

605 On 25 July 2017, Mr Nguyen sent an email to Mr Clothier (copied to Messrs Hunter and Macdonald), attaching the signed term sheet with Mr Jaafar's handwritten changes.[945] In this email Mr Nguyen stated:

> Prior before [*sic*] 2 weeks before of the expiration date, could we sit down face to face and discuss the next steps / phase for us with a couple of high stakes managers.
>
> Also, we I will be on annual leave starting tomorrow – could you please liaise with Paul Ybanez. Please do CC me if need be.[946]

606 Mr Macdonald executed the term sheet on behalf of GetSwift (**Fantastic Furniture Agreement**).[947] The Fantastic Furniture Agreement contained hand-written amendments to clause 4, which were to the following effect:

> 38 months (comprised of a trial period plus the initial term), as follows:
>
> - Trial Period - (Includes 30 days free) Expires ~~September 1st, 2017~~ 1st October 2017
> - Initial Term - 36 months: Initial Term to start no later than 1st September 2017 to 1st of September 2020 - at least 7 days prior to the expiration of the trial period, the Client must by notice in writing (to be given to GetSwift) elect if it does not wish to continue this Agreement for the further initial term period of 36 months, commencing immediately following the expiration of the trial period. If no notice in writing is issued to GetSwift then the initial term will automatically commence on ~~September 1st, 2017~~ 1st October 2017.

607 Clause 1 of Schedule 1 to the Agreement also provided for automatic renewal for successive 12-month periods, subject to advance notice of non-renewal and Mr Jaafar also included the words "Trial until 1st October 2017 approved to proceed" at the bottom of the page, underneath the execution clause.[948]

[944] Jaafar Affidavit (GSW.0009.0004.0001_R) at [19].
[945] GSWASIC00014972 attaching GSWASIC00014980.
[946] GSWASIC00014972. See also GSWASIC00009315 at 9318.
[947] Fantastic Furniture Agreement (GSWASIC00063292); Agreed Background Facts (GSW.0002.0002.0001) at [57]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [18.].
[948] Fantastic Furniture Agreement (GSWASIC00063292); Jaafar Affidavit (GSW.0009.0004.0001_R) at [18].

Clarification of termination prior to the end of the trial period

608 On 26 July 2017, Mr Jaafar sent an email to Mr Clothier, on which Mr Nguyen was copied, in which he stated:

> [P]lease ensure prior to the commencement of the trial that it's clear to GetSwift that we will not proceed after the trial until we have all mutually agreed this software is the way forward for us.
>
> If that does cause any issues at all please let me know.[949]

609 On the same date, Mr Clothier sent an email to Mr Macdonald, forwarding Mr Jaafar's email, in which he stated:

> I don't think they understood the term sheet before signing it.
>
> I spoke to Jason Jack (General Manager of IT) he is under the impression that Abdul had signed for a trail [*sic*].[950]

610 Mr Macdonald responded to Mr Clothier, copied to Messrs Hunter and Ozovek, stating:

> OK so the term sheet maps out a free trial for them and then makes it easy for them to roll straight into initial term upon successful trial. They do have the ability to opt out if they are not happy with the trial.[951]

Preparation and release of the Fantastic Furniture and Betta Homes Announcement

611 On 21 July 2017, Mr Hunter sent an email to Mr Macdonald with the subject line "List of announcements", in which he stated:

- BETTA
- Fantastic Furniture
- Bareburger
- Zambrero NZ

Let me know as soon as the contracts are in.[952]

612 On 30 July 2017, Mr Macdonald sent an email to Mr Hunter attaching a copy of the Fantastic Furniture Agreement, in which he stated "OK so when do you want to release this one?" and

[949] GSW.1025.0001.0001. See also GSWASIC00009315 at 9316.
[950] GSWASIC00014837.
[951] GSWASIC00014837.
[952] GSWASIC00015360.

provided some links to websites relating to Fantastic Furniture.[953] Mr Hunter responded: "After EGM".[954]

613 On 6 August 2017, Mr Hunter sent an email to Mr Macdonald and Mr Ozovek attaching a draft announcement concerning GetSwift's entry into the Fantastic Furniture agreement, as well as draft announcements regarding Betta Homes and NA Williams.[955] In this email, Mr Hunter stated: "Please review before I send them along to our PR team first then onto our advisers for comment. … I think we release Betta tonight, followed next week by FF, then the week after NA etc."[956] Mr Ozovek provided minor comments while Mr Macdonald did not respond.[957]

614 On 7 August 2017 Mr Hunter sent an email to Mr Polites (in response to an email regarding an interview with a reporter) in which he said "we may have (waiting for contracts) a slew of new deals to announce in the next few weeks. Can send you announcements to review and to provide feedback with the caveat that not all contracts are in hand".[958] Mr Polites responded on the same date, stating, "OK no worries … please keep in mind that we're about to enter earning season. It picks up pace the middle of this week. If you want a bigger bang keep the power dry until post August 25".[959]

615 On the same date, Mr Hunter sent a further email to Mr Polites (copied to Mr Macdonald and Ms Hughan), attaching drafts of the ASX announcements in relation to GetSwift's agreements with Fantastic Furniture, Betta Homes, NA Williams, and Bareburger.[960] In this email, Mr Hunter stated, "no releases until after earning season then, pls [*sic*] review the following and provide feedback :)".[961]

616 On 8 August 2017, Ms Hughan sent an email to Messrs Hunter and Macdonald in which she suggested that GetSwift combine the proposed announcements concerning GetSwift's entry

[953] GSWASIC00014602 attaching GSWASIC00014603.
[954] GSWASIC00014590.
[955] GSWASIC00057422 attaching GSWASIC00040783, GSWASIC00040784, and GSWASIC00040781.
[956] GSWASIC00057422.
[957] GSWASIC00057416 attaching GSWASIC00040777.
[958] GSW.0019.0001.6281.
[959] GSW.0019.0001.6281.
[960] GSW.0019.0001.6281 attaching GSW.0019.0001.6290, GSW.0019.0001.6288, and GSW.0019.0001.6293.
[961] GSW.0019.0001.6281.

into the Fantastic Furniture and Betta Homes Agreements.[962] On 9 August 2017, Mr Hunter replied to Ms Hughan (copied to Mr Macdonald and Mr Polites) requesting that M+C Partners provide feedback on the draft announcement concerning GetSwift's entry into the Fantastic Furniture and Betta Homes Agreements.[963]

617 On 10 August 2017, Mr Kiki emailed Mr Hunter a draft announcement concerning GetSwift's entry into the Fantastic Furniture and Betta Homes Agreements which contained some edits made by Mr Kiki.[964]

618 On 23 August 2017, Mr Hunter sent an email to Mr Mison (copied to Mr Macdonald), in which he requested that Mr Mison format the draft announcement and release it to the market that same day.[965] In the email, Mr Hunter stated: "There will be an avalanche of other announcements coming in addition to this shortly, this is just the tip of the iceberg".[966] Following this, Mr Macdonald sent an email to Mr Nguyen notifying him that GetSwift, as part of its ongoing disclosure requirements as a public company, was required each month to provide updates to the ASX about client agreements the company had signed, stating: "Please let me know if you need anything in the interim and we look fwd [*sic*] to ramping up with you guys shortly!"[967] Mr Nguyen would reply much later on 22 September 2017 (see below at [632]).[968] The evidence reveals that neither Mr Nguyen nor Mr Jaafar were shown, or consulted about the contents of, the announcement before it was released to the ASX.[969]

619 At 1:25 am on 23 August 2017, Mr Mison, presumably after formatting the announcement, emailed Mr Hunter, Mr Macdonald, Ms Gordon and Mr Eagle, asking whether they had any comments or queries in relation to the announcement.[970] Mr Macdonald then sent some minor amendments,[971] and a final version was then circulated at 8:49am by Mr Mison.[972]

[962] GSW.0019.0001.6323.
[963] GSW.0019.0001.6323 attaching GSW.0019.0001.6325.
[964] GSWASIC00062332 attaching GSWASIC00031156.
[965] GSW.0019.0001.6514 attaching GSW.0019.0001.6515.
[966] GSW.0019.0001.6514.
[967] GSW.1012.0001.0025.
[968] GSW.1012.0002.0001.
[969] Nguyen Affidavit (GSW.0009.0037.0001_R) at [38]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [27].
[970] GSWASIC00012900 attaching GSWASIC00012901.
[971] GSWASIC00012898.
[972] GSWASIC00012800 attaching GSWASIC00012801.

620 On 23 August 2017 at 10:19am, GetSwift submitted the announcement to the ASX.[973] At 10:20am the ASX released to the market the announcement concerning GetSwift's entry into the Fantastic Furniture and Betta Homes Agreements, entitled "GetSwift signs Betta Home Living and Fantastic Furniture" (**Fantastic Furniture & Betta Homes Announcement**).[974] As to Fantastic Furniture it recorded:

> **GetSwift Limited (ASX: GSW)** ('GetSwift' or the 'Company'), the SaaS solution company that optimises delivery logistics world-wide, is pleased to announce that it has signed exclusive commercial multi-year agreements with BETTA Home Living (Betta.com.au) and Fantastic Furniture (Fantatsticfurniture.com.au).
>
> …
>
> Fantastic Furniture has grown to become one of Australia's largest furniture and bedding manufacturers and retailers. Their furniture and bedding superstores can be found in every major metropolitan city and regional towns, with 75 stores around Australia.[975]

621 At 10:44am, Mr Mison sent an email to Messrs Macdonald, Hunter, Eagle and Ms Gordon, forwarding the confirmation of release from the ASX.[976]

622 Realising that the announcement was not marked as price sensitive, Mr Hunter went searching for someone to blame, writing to Mr Mison (copied to Mr Macdonald, Mr Eagle and Ms Gordon) in the following characteristically peremptory way:

> Scott,
>
> Can you please let us know why was this not marked as material? Did we submit it as such?
>
> And please dont [*sic*] tell me that we did not instruct you to do so, because this is not the first time something like this has gone out. We have done this before. The ASX officer will only remove material indicators and not assign them if they find they are not valid.
>
> So one of two things has occurred here - either we submitted marked as material and it was removed by them, or it was never submitted as material. If its [*sic*] not the former this is a serious error, and a second error in judgment one on this notice alone.
>
> Joel/Brett please contact the ASX liaison officer and get me the facts right away.

[973] Agreed Background Facts (GSW.0002.0002.0001) at [58].
[974] Fantastic Furniture & Betta Homes Announcement (GSW.1001.0001.0789).
[975] Fantastic Furniture & Betta Homes Announcement (GSW.1001.0001.0789) (emphasis in original).
[976] GSWASIC00012682 attaching GSWASIC00012683. See also GSWASIC00012667.

> Pending those we will then make the appropriate decisions.[977]

623 Mr Mison responded, noting: "When I release an announcement, I can not mark it market sensitive. It is at the discretion of the ASX. Please contact the ASX officer to discuss."[978]

624 Mr Macdonald subsequently sent an email to Mr Kabega, copied to Mr Hunter, in which he asked: "Who determines if a release is market sensitive or not?"[979] Mr Macdonald sent a further email to Mr Kabega (copied to Messrs Eagle and Hunter) in which he stated, "looping in Brett".[980] Mr Kabega replied, stating the following: he had just spoken over the phone to Mr Eagle; "[p]aragraph 4.2 of Guidance Note 8, state the following: the entity must form a view as to whether the information contained in the market release is price sensitive"; the Market Announcements team ("MAO") were supposed to mark the Fantastic Furniture & Betta Homes Announcement as "price sensitive" but erroneously did not; and "once an announcement has been released without a Price Sensitive tag, we cannot retrieve it and place the tag on it".[981]

625 Following this exchange, at 1:04pm on 23 August 2017, Mr Eagle sent an email to Messrs Hunter and Macdonald in which he stated:

> Guys, just fyi [*sic*] I have called ASX again on this and told them they need to wear responsibility and do something to correct the negative impression this created for us with our investor base. Really think it is piss poor to acknowledge their error and apologise by private email, but leave us as a company to wear the negative impression from the market that we should have released it as price sensitive disclosure.
>
> Have asked Andrew to talk internally and come up with some corrective measure that communicates to the market. Will let you know when they get back to me.[982]

626 Mr Hunter replied "[g]ood work".[983] At 1:52pm, Mr Hunter also sent an important email to Messrs Macdonald and Eagle, in which he stated his view of such an announcement: "This has an effect on SP [share price] – so something to keep in mind when we talk to them in the future".[984]

[977] GSWASIC00012680.
[978] GSWASIC00012680.
[979] GSWASIC00012667 at 2668.
[980] GSWASIC00012667.
[981] GSWASIC00012667.
[982] GSWASIC00012464.
[983] GSWASIC00012464.
[984] GSWASIC00012667.

627 On 25 August 2017, Mr Kabega sent an email to Messrs Eagle, Hunter and Macdonald containing the content of Guidance Note 14 Listing Rule 3.1 and Guidance Note 8: Continuous Disclosure Listing Rules, which he thought "may be of help regarding the classifications of announcements by ASX market Announcements Office".[985] On the same date, Mr Macdonald sent an email to Messrs Eagle and Hunter forwarding Mr Kabega's email, the content of which is subject to a claim of legal professional privilege. Mr Hunter responded stating, "play it smart… the point is we don't want to antagonize [*sic*] them, but we need to make sure we are acknowledged".[986]

The initial trial of the GetSwift Platform by Fantastic Furniture

628 On 4 September 2017, Mr Macdonald sent an email to Messrs Clothier and Ozovek in which he asked: "Have FF started on-boarding/getting ready to use yet?"[987] After an exchange of emails,[988] on 14 September 2017, Mr Clothier attended Fairfield distribution centre and met Mr Ybanez and Ms Wendy Harmsen, the Delivery Manager at the distribution centre.[989] Mr Clothier gave a demonstration of GetSwift software and configured the software for Fantastic Furniture to use.

629 Between 8 September and 16 September 2017, Mr Nguyen was overseas.[990] On his return to work on 18 September 2017, Mr Nguyen had a meeting at head office at which he was told by either Mr Brendan Tertini, General Manager Marketing at Fantastic Furniture, or Mr Leigh McKnight, E-Commerce Manager at Fantastic Furniture, that the GetSwift software involved certain customer interactions, such as customers receiving automatic text messages in relation to the progress of their delivery. Such customer interactions required approval from Fantastic Furniture's marketing team before Fantastic Furniture could approve use of GetSwift's software, and due to this, Mr Nguyen was told that they would need more time to channel the request for approval.[991]

[985] GSW.1001.0001.0148.
[986] GSWASIC00031715_R.
[987] GSWASIC00056528.
[988] GSW.1012.0002.0002.
[989] GSW.1012.0002.0002; Nguyen Affidavit (GSW.0009.0037.0001_R) at [27], and [30].
[990] Nguyen Affidavit (GSW.0009.0037.0001_R) at [28].
[991] Nguyen Affidavit (GSW.0009.0037.0001_R) at [29].

630 In the week commencing 18 September 2017, Mr Nguyen also had a meeting with Mr Ybanez to get an update on the GetSwift software. In that meeting, Mr Ybanez told him that Mr Clothier had attended the Fairfield distribution centre on 14 September 2017 and met with Mr Ybanez and Ms Harmsen, the Delivery Manager at the distribution centre.[992] Mr Ybanez also told Mr Nguyen that he had started playing around with the GetSwift software and that the software was not suitable for Fantastic Furniture's requirements.[993] Mr Ybanez reported problems when uploading jobs on the Fantastic Furniture portal, that Fantastic Furniture's customer data was not uploading correctly and that the customer's addresses needed to be amended manually.[994]

631 Mr Jaafar was not happy with the performance of the GetSwift software given problems with integration, although attributed such problems to Fantastic Furniture using a "very old system".[995] Further Mr Nguyen accepted that difficulties of this nature are relatively common when starting to use a new software system and one would expect they could easily be ironed out,[996] and notwithstanding the uploading difficulties encountered by Mr Ybanez, Mr Nguyen was still keen to commence some trial runs of the GetSwift platform.[997] However, Mr Jaafar had identified an alternative product called My Route Online which he said worked successfully, was appropriate for Fantastic Furniture's needs, and was a monthly subscription service.[998]

Termination of the Fantastic Furniture Agreement

632 The trial runs were scheduled to commence on 25 September 2017.[999] However, on 22 September 2017, Mr Nguyen sent an email to Mr Macdonald in which he stated:

> Apologies for the late reply – not sure how I missed this email, maybe too much Holiday leave in the last weeks! I am very well thanks. Thanks for the heads up. Just a quick one – as the [trial] period finishes on the 1st of October, do we need to advise you guys if we do proceed or not after the [trial] period? We're kicking off some [trial] runs on Monday with no customer interactions (we need to get approval from

[992] Nguyen Affidavit (GSW.0009.0037.0001_R) at [30].
[993] Nguyen Affidavit (GSW.0009.0037.0001_R) at [30].
[994] Nguyen Affidavit (GSW.0009.0037.0001_R) at [30].
[995] T654.12–17 (Day 9); Jaafar Affidavit (GSW.0009.0004.0001_R) at [24].
[996] T646.43–47 (Day 9).
[997] T647.1–2 (Day 9).
[998] Jaafar Affidavit (GSW.0009.0004.0001_R) at [24].
[999] GSW.1012.0002.0001.

marketing team in relation to the sms/email alerts).[1000]

633 Mr Nguyen did not receive a response from Mr Macdonald.[1001] Later that day on 22 September 2017, Mr Nguyen said to Mr Jaafar that he was concerned that he would not receive a response to his email to Mr Macdonald before 1 October 2017.[1002] Mr Jaafar instructed Mr Nguyen to send an email to GetSwift to give them notice that Fantastic Furniture would not be proceeding beyond the trial period on 1 October 2017 so that Fantastic Furniture could avoid being locked into the 36 month contract.[1003] That same day, Mr Nguyen sent an email to Mr Clothier in the following terms:

> Please accept this email as formal notice that we will not proceed after the trial period (1st of October). We still have some hoops to jump thru [sic] on our side of things as it has some customer interactions which needs to be properly channelled to our marketing team for approval. However, we're kicking off some trial runs next week for the tracking purpose [*sic*] and to give us a glimpse of what we can expect, which then we can feed the experience to our marketing team [*sic*].[1004]

634 Mr Clothier replied stating:

> Thanks for your email. When I met with Wendy and Paul last week I was under the impression they were happy with the platform.
>
> I know that there will be ongoing testing and I will be working closely with your team to ensure that GetSwift adds value to your business and improves your customer satisfaction.[1005]

635 The second paragraph was understood by Nguyen to be a reference to the data upload issues,[1006] which were the kid of issues that could be easily ironed out.[1007]

636 Later that day, Mr Ozovek sent an email to Mr Macdonald forwarding the email chain between Mr Nguyen and Mr Clothier in which Mr Nguyen terminated the contract.[1008]

[1000] GSW.1012.0002.0001.
[1001] Nguyen Affidavit (GSW.0009.0037.0001_R) at [32].
[1002] Nguyen Affidavit (GSW.0009.0037.0001_R) at [33].
[1003] Nguyen Affidavit (GSW.0009.0037.0001_R) at [33]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [25].
[1004] GSW.1012.0001.0009; GSWASIC00009315 at 9315.
[1005] GSW.1012.0001.0009.
[1006] T650.23–24 (Day 9).
[1007] T646.35–647.20 (Day 9).
[1008] GSWASIC00009315.

637 On day 17 of the trial, GetSwift sought leave to re-open its case to tender a document dated 20 October 2017 that GetSwift omitted to tender before it had closed its case.[1009] I gave leave to reopen, and ASIC had no additional case in reply.[1010] That 20 October 2017 document was an email Mr Clothier sent to Mr Macdonald and Mr Ozovek reporting on the status of the project:

> The latest from Fantastic Furniture is that the project has been put on hold.
>
> I received an email notice from Simon. I did respond saying that we have come to the warehouse, done a presentation and trained the staff involved. The staff were happy with the system and he has not given it enough time to see the results. I received no response.
>
> I then gave Jason Jack, General Manager of IT, a call to find out what went wrong, had I done something wrong. Reading between the lines, there was no communication between warehouse, marketing and IT. IT was not aware of the termsheet signed.
>
> Jason said to me that they must follow an internal process with IT and marketing regarding the delivery process and will come back to us.
>
> I will keep a light communication touch and keep you updated.[1011]

638 In this email, there was no indication of when the alleged conversation between Mr Jack and Mr Clothier took place, including whether it took place before or after the termination took effect on 1 October 2017.[1012]

639 The evidence also reveals that Mr Clothier was involved in further communications with Mr Dennis and Mr Jack (of Fantastic Furniture's IT Department).[1013] It appears that Mr Graham Dennis (also of Fantastic Furniture's IT Department) had been described as the "BA completing evaluations" of the solutions, but Mr Nguyen was unaware of their involvement[1014] and so was Mr Jaafar.[1015]

640 On 2 February 2018, Mr Hunter sent an email to Mr Ozovek, with the subject "Fantastic Furniture last usage" asking "can you please confirm when was the last time they used the

[1009] T1070.1–1071.10 (Day 17).
[1010] T1071.5–10 (Day 17).
[1011] GSWASIC00055505.
[1012] GSWASIC00055505; GSWTB0011; T650.33–35 (Day 9).
[1013] GSWTB0011; T650.33–35 (Day 9).
[1014] T650.37–41 (Day 9).
[1015] T656.3–10 (Day 9).

platform?"[1016] Mr Ozovek responded to Mr Hunter, copied to Mr Macdonald, stating "late September 2017".

641 Fantastic Furniture did not subsequently enter into any agreement with GetSwift.[1017]

G.1.9 *Betta Homes*

642 BSR Australia Ltd (**BSR**) is the parent company of BSR Franchising Pty Ltd (**Betta Homes**). Together, BSR and Betta Homes comprise the BSR Group. During 2017, Betta Homes was the franchisor of electrical appliance and furniture stores trading under the brands Betta Home Living, Ambiance, Furniture Zone and Designer Appliances.[1018] Betta Homes' franchisees offered delivery services, and in 2017, there were approximately 200 franchised and service recipient stores Australia-wide.[1019] The delivery of smaller items was managed by Betta Homes through a third-party delivery software provider, Shippit.[1020]

643 In early May 2017, Ms Amelia Smith, the National Marketing Manager (Digital) at BSR, spoke with Mr Rob Hango-zada and Mr William On of Shippit, regarding the type of "delivery solutions" that Ms Smith was considering for Betta Homes. They recommended two delivery software providers: GetSwift and Bringg.[1021] Ms Smith was also told that GetSwift and Bringg would be able to be integrated with their current Shippit software.[1022] Ms Smith excluded Bringg as being unsuitable because it was an American company that had not yet had any trials in Australia.[1023] That left GetSwift as the sole candidate.

Initial dealings and negotiation of the Betta Homes Agreement

644 After Ms Smith submitted an online request to GetSwift for a demonstration, arrangements were made for a meeting between Ms Smith and Mr Macdonald at Betta Homes Group's

[1016] GSWASIC00070959.
[1017] Nguyen Affidavit (GSW.0009.0037.0001_R) at [39]; Jaafar Affidavit (GSW.0009.0004.0001_R) at [28].
[1018] Agreed Background Facts (GSW.0002.0002.0001) at [798].
[1019] Affidavit of Amelia Josephine Smith sworn 1 October 2019 (**Smith Affidavit**) (GSW.0009.0009.0001_R) at [4]; Affidavit of Adrian Mitchell affirmed 1 October 2019 (**Mitchell Affidavit**) (GSW.0009.0005.0001_R) at [4], and [6].
[1020] Smith Affidavit (GSW.0009.0009.0001_R) at [6].
[1021] Smith Affidavit (GSW.0009.0009.0001_R) at [8].
[1022] T658.40–659.6 (Day 9).
[1023] Smith Affidavit (GSW.0009.0009.0001_R) at [42]; T659.8–18 (Day 9).

offices.[1024] That meeting occurred on 18 May 2017, during which Mr Macdonald gave a presentation on how the GetSwift platform worked.[1025] Ms Smith confirmed that any new delivery platform needed to be capable of being integrated into the existing software operated by Shippit.[1026] Following this meeting, the Betta Homes agreement was negotiated by telephone calls and emails exchanged between Mr Adrian Mitchell (the Chief Marketing Officer at BSR), Ms Smith, Mr Macdonald, and Mr Hunter between 18 May 2017 and 21 August 2017.[1027]

645 On 18 May 2017, Mr Macdonald sent an email to Ms Smith (copied to Mr Hunter and Ms Cox), in which he stated:

> Lovely to meet with you before and learn about your delivery software requirements.
>
> As promised I am attaching the presentation we went through as well the 1 page term sheet that outlines your no obligation trial as well as discounted group pricing when you proceed post-trial into a national roll out.
>
> I am cc'ing Bane Hunter our Chairman (as your additional executive contact) as well as Susan Cox (your future account manager).[1028]

646 The document entitled "Term Sheet" attached to Mr Macdonald's email contained the following clause:

> Clause 4 - Term
>
> 38 months (comprised of a trial period plus the initial term), as follows:
>
> - **Trial Period** - (Includes 30 days free) Expires July 1st, 2017
> - **Initial Term** – 36 months; Initial Term to start no later than 1st July 2017 to 1st of July 2020 - at least 7 days prior to the expiration of the trial period, the Client must by notice in writing (to be given to GetSwift) elect if it does not wish to continue this Agreement for the further initial term period of 36 months, commencing immediately following the expiration of the trial period.

[1024] Smith Affidavit (GSW.0009.0009.0001_R) at [9]–[10]; GSWASIC00019702.
[1025] Smith Affidavit (GSW.0009.0009.0001_R) at [10].
[1026] Smith Affidavit (GSW.0009.0009.0001_R) at [10].
[1027] Mitchell Affidavit (GSW.0009.0005.0001_R) at [10]–[19]; Smith Affidavit (GSW.0009.0009.0001_R) at [11]–[23]; GSWASIC00019358; GSWASIC00019359; GSWASIC00019407; GSWASIC00019345; GSWASIC00018966, and GSWASIC00018461; GSWASIC00063937, and GSWASIC00017149; GSWASIC00017150; GSWASIC00017157; GSWASIC00015567, and GSWASIC00015530; GSWASIC00015533; GSWASIC00015537, and GSWASIC00014929; GSWASIC00014932; GSIASIC00018966; GSWASIC00017038, and GSWASIC00014351; GSWASIC00014356, and GSWASIC00012939; Betta Homes Agreement (GSWASIC00012945).
[1028] GSWASIC00019358 attaching GSWASIC00019359, and GSWASIC00019407.

> If no notice in writing is issued to GetSwift then the initial term will automatically commence on July 1st 2017.[1029]

647 On 31 May 2017, Ms Smith sent an email to Mr Macdonald (copied to Ms Cox, Mr Hunter, and Mr Mitchell) regarding the proposed trial of the GetSwift Platform. In this email, Ms Smith requested to have a further discussion with Mr Macdonald to discuss "in further detail, what would be involved in a Get Swift trial for Betta". Included in the email was an "agenda" of talking points, including "[i]ntegration options what is required from all parties Get Swift, Shippit, Betta".[1030]

648 On 13 June 2017, Mr Macdonald sent an email to Ms Smith (copied to Mr Mitchell, Mr Hunter and Ms Cox), attaching an updated draft "Term Sheet".[1031]

649 On 4 July 2017, Mr Mitchell sent an email to Mr Macdonald (copied to Ms Smith, Mr Hunter, Ms Cox, Ms Rory Salisbury of Betta Homes and Ms Nicola Allder of Betta Homes), attaching a further revised draft "Term Sheet" (containing the changes made by Betta Homes in mark-up) and a document entitled "Procurement Security Questionnaire".[1032] The updated term sheet contained the following clauses:

> Clause 3 – Services
>
> Client engages GetSwift to provide the following services (the "Services") and GetSwift accepts such engagement:
>
> - A non-exclusive licence to use GetSwift's proprietary software platform to provide Client with logistics management, tracking, dispatch, route and reporting of delivery operations, including provision of SMS alerts, related reports and system data dumps; and
> - Consultancy advice in relation to the Services in a reasonable number of meetings as Client reasonably requests.
>
> …
>
> Clause 4 – Term
>
> 14 months (comprised of a trial period plus the initial term), as follows:
>
> - **Trial Period** - 2 months (Includes 30 days free), commencing on the date that the parties reasonably agree that GetSwift's proprietary software platform is

[1029] GSWASIC00019407 (emphasis in original).
[1030] GSWASIC00018966.
[1031] GSWASIC00018461 attaching GSWASIC00063937.
[1032] GSWASIC00017149 attaching GSWASIC00017150, and GSWASIC00017157.

> installed, operating effectively and available for immediate use by the Client ("Effective Date")
>
> - **Initial Term** – 12 months, provided that during the Trial Period, the Client has by notice in writing given to GetSwift elected to continue this Agreement for the Initial Term. If the Client elects to proceed with the Initial Term, the Initial Term will commence immediately following the expiration of the Trial Period and will continue for a period of 12 months from that date.[1033]

650 As can be seen, one of those suggested amendments was that the trial period would be for two months, commencing on the date that the parties reasonably agreed that the GetSwift propriety software platform is installed, operating effectively and available for immediate use by the client.[1034] Further, the initial term was not to commence unless written notice was provided by Betta Homes to GetSwift electing to continue with the agreement for the initial term.[1035] Lastly, the references in clause 3 to Betta Homes "exclusively" engaging GetSwift were removed. At the time that amendment was suggested, Ms Smith assumed that GetSwift and Shippit would cooperate to do what was needed to be done to integrate the software, so that, in so far as integration was concerned, there would be no difficulty in having the software installed, operating effectively and available for immediate use.[1036]

651 On 11 July 2017, Mr Hunter sent an email to Mr Macdonald regarding the term of the proposed "Term Sheet" with Betta Homes. In this email, Mr Hunter stated:

> PS any chance they would do 15 months instead of 12? This way we can announce a multiyear? If its [*sic*] a problem we go with 12.[1037]

652 On 19 July 2017, Ms Smith sent an email to Mr Macdonald (copied to Mr Hunter, Ms Cox, Ms Salisbury and Ms Allder) requesting that GetSwift come back to Betta Homes regarding the amendments to the proposed "Term Sheet". In this email, Ms Smith stated:

> Ideally we would like to look at kick off a pilot with yourselves and Shippit in August, but would need to get these documents finalised before we do so.[1038]

[1033] GSWASIC00017150 (emphasis in original).
[1034] GSWASIC00017150; Smith Affidavit (GSW.0009.0009.0001_R) at [17].
[1035] GSWASIC00017150; Smith Affidavit (GSW.0009.0009.0001_R) at [17].
[1036] T662.1–5 (Day 9).
[1037] GSWASIC00031873_R.
[1038] GSWASIC00015567.

653 On 20 July 2017, Mr Macdonald sent an email to Mr Mitchell (copied to Ms Smith, Mr Hunter, Ms Cox, Mr Clothier, Ms Salisbury and Ms Allder), attaching an updated draft "Term Sheet".[1039] In this email, Mr Macdonald stated, among other things:

> We have accepted majority of your changes. The only final items are the initial term length and data storage.
>
> 1. Term length: We are happy to meet you halfway for an 18 month period which makes it economically viable for us if we are to also agree to do the integrations, set up & software customizations (reporting, features etc. for your specific use case). If this is ok could you please accept, sign and return and we can commence planning for phase 1.[1040]

654 On 25 July 2017, Ms Smith emailed Mr Macdonald (copied to Mr Hunter, Ms Cox, Mr Clothier, Ms Salisbury and Ms Allder), attaching an updated draft term sheet and indicating that Betta Homes would agree to an "18 month initial period".[1041]

655 During the course of the negotiations with Betta Homes, Mr Macdonald and Ms Cox sent various drafts of the Betta Homes Agreement to Mr Eagle for his input and review, and Mr Eagle provided his comments (although they are redacted).[1042]

656 On 31 July 2017, Mr Macdonald sent an email to Mr Hunter and Mr Eagle in which he stated:

> Guys,
>
> They have come back to us and agreed to 18 months if we can agree to the final mark ups (only a couple of minor ones)? any issues with accepting any of these? My only comments are: the trial period wording is a little subjective.[1043]

657 In the email, Mr Macdonald also asked Mr Eagle to approve the wording of "Limitation of liability".[1044] The email also contained a Google documents link to a revised draft term sheet containing comments from Betta Homes.[1045] Mr Hunter replied that "18 is good for me".[1046] Immediately after, Mr Macdonald sent a further email to Mr Hunter (copied to Mr Eagle), in

[1039] GSWASIC00015530 attaching GSWASIC00015533, and GSWASIC00015537.
[1040] GSWASIC00015530.
[1041] GSWASIC00014929 attaching GSWASIC00014932.
[1042] GSWASIC00031908_R; GSWASIC00031905_R; GSWASIC00031899_R; GSWASIC00031884_R; GSWASIC00031873_R; GSWASIC00032411_R; GSWASIC00032404_R; GSWASIC00014588.
[1043] GSWASIC00067591_R (emphasis omitted).
[1044] GSWASIC00014588.
[1045] GSWASIC00067591_R.
[1046] GSWASIC00014588.

which he stated, "great now just need ok on final mark ups and we are good to get this signed … Will wait on Brett to look over".[1047]

658 On 7 August 2017, Mr Eagle sent an email to Messrs Hunter and Macdonald which has been redacted and is subject to a claim for legal professional privilege.[1048] Following this, on the same day, Mr Hunter sent an email to Mr Eagle (copied to Mr Macdonald) in the following terms:

> We have a direct financial impact with the delay in getting Betta contract signed among others.This is in your to do list along with a number of contracts we are waiting on. Did you send this out already?
>
> We have noticed lately a disconnect in what our expectations are. The company needs to move forward aggressively and this is level [*sic*] of response is not cutting it.
>
> If you are unable to meet the time commitments the company requires for continued operations this will be noted and we need to make alternative arrangements. Please also note that will have a direct impact on any share allocations as well.[1049]

659 Mr Eagle replied to Mr Hunter (copied to Mr Macdonald), stating, among other things:

> If we can settle into our paid arrangement it will mean no longer needing to chase cash flow my side – same challenge I have always been raising of course. ☺ Not an excuse and committed as always to building what's needed; just a reality with trying to carry this work load for so many months without sending through bills. I think we are almost there on putting new arrangement [*sic*] in place so assume we can transition to that.[1050]

660 Later that day, Mr Eagle also replied to Mr Hunter and Mr Macdonald regarding the proposed term sheet with Betta Homes. GetSwift has asserted a claim of legal professional privilege over this email from Mr Eagle, and his comments on the "Term Sheet" are redacted.[1051] The same day, Mr Macdonald sent an email to Ms Smith (copied to Mr Mitchell, Mr Hunter and others) attaching a version of the "Term Sheet" executed on behalf of GetSwift.[1052]

661 For reasons that will become evident below, it is convenient to note here that on 11 August 2017, Mr Eagle left Sydney to travel to Berlin, with a scheduled stopover in Abu Dhabi, and

[1047] GSWASIC00014588.
[1048] GSWASIC00067576_R.
[1049] GSWASIC00067580_R.
[1050] GSWASIC00067580_R.
[1051] GSWASIC00067576_R.
[1052] GSWASIC00014351 attaching GSWASIC00014356.

arrived in Berlin on 12 August 2017.[1053] He returned to Sydney from Amsterdam, with a stop over again in Abu Dhabi,[1054] and a scheduled to arrival in Sydney at 6:30am on 23 August 2017.[1055]

662 On 16 August 2017, Mr Macdonald sent an email to Mr William On of Shippit (copied to Mr Hunter), in which he stated:

> I see we are going to be integrating shortly with Betta all things pending on the legals side. Wanted to touch base on a couple of things and bring our Chairman (Bane Hunter) in on the conversation. We think that there might be some synergies of opportunity by approaching things potentially from a joint perspective so keen to have that discussion if you are around next week sometime.[1056]

663 Later that day, Mr On replied to Mr Macdonald's email asking "How does a call 9AM Wednesday sound?"[1057]

664 On 21 August 2017, Graeme Cunningham, CEO of Betta Homes, countersigned the "Term Sheet" on behalf of Betta Homes (**Betta Homes Agreement**).[1058] The Betta Homes Agreement included the following relevant terms:

> Clause 3 – Services
>
> [Betta Homes] engaged GetSwift to provide the following services and GetSwift accepts such engagement on an exclusive basis following the Trial Period, as specified below. [Item 3: Services]
>
> Clause 4 – Term
>
> 20 months (comprised of a trial period plus the initial term), as follows:
>
> - Trial Period – 2 months (includes 30 days free) commencing on the date that the parties reasonably agree that GetSwift's proprietary software platform is operating affectively and available for immediate use by [Betta Homes] [Item 4: Term]
>
> - Initial Term – 18 months, provided that during the Trial Period, [Betta Homes] has by notice in writing given to GetSwift elected to continue this Agreement for the Initial Term. If the Client elects to proceed with the Initial Term, the Initial Term will commence immediately following the expiration of the Trial

[1053] BRE.100.004.0015; BRE.100.004.0001 at 0002.
[1054] BRE.100.004.0015 at 0016; BRE.100.004.0001 at 0002.
[1055] BRE.100.004.0015 at 0016.
[1056] GSWASIC00013409.
[1057] GSWASIC00013409.
[1058] Betta Homes Agreement (GSWASIC00012945); Agreed Background Facts (GSW.0002.0002.0001) at [65]; Smith Affidavit (GSW.0009.0009.0001_R) at [23].

> Period and will continue for a period of 12 months from that date. [Item 4: Term][1059]

665 Clause 1 of Schedule 1 to the Agreement also provided for renewal terms for successive 12-month periods.

666 On 22 August 2017, Mr Eagle sent an email to Mr Hunter, Mr Macdonald, and Ms Gordon regarding timing for a proposed board meeting.[1060] In that email Mr Eagle said:

> All,
>
> Just getting on a plane back to Sydney, arrive Wed [*sic*] morning. Can I suggest esrly [*sic*] Thursday Sydney time – 9am or earlier.

667 Also on 22 August 2017, Ms Smith sent an email to Mr Macdonald (copied to Mr Mitchell, Mr Hunter and others), attaching the Betta Homes Agreement.[1061] In this email, Ms Smith stated:

> Great news please find attached the signed Term Sheet. Please let me know what the next steps are to get the project underway. Happy to organise a meeting with the guys at Shippit to get the integration started.[1062]

668 In cross-examination, it was put to Ms Smith that, by the time she signed the term sheet, she had formed the view that she would be proceeding with GetSwift, to which Ms Smith made clear: "We would be proceeding for a trial".[1063] Ms Smith believed that Shippit would cooperate with GetSwift to ensure that the integration occurred and if the integration occurred successfully, the expectation was that the trial period would commence; further, Ms Smith did not think that prior to the commencement of the trial period Shippit might refuse to take any steps to integrate with the GetSwift software,[1064] although she noted that "the ball was in Shippit's court in terms of the integration".[1065] It was clear that at the time she signed the term sheet she did not have any firm view as to whether it was likely the trial would succeed.[1066]

[1059] Betta Homes Agreement (GSWASIC00012945).
[1060] BRE.100.006.0001.
[1061] GSWASIC00012939 attaching Betta Homes Agreement (GSWASIC00012945).
[1062] GSWASIC00012939.
[1063] T660.36–37 (Day 9).
[1064] T662.15–28 (Day 9).
[1065] T663.45–46 (Day 9).
[1066] T660.43–46 (Day 9).

The Fantastic Furniture & Betta Homes Announcement

669 Mr Hunter and Mr Macdonald reviewed and amended a number of drafts of the Fantastic Furniture & Betta Homes Announcement as is set out in the factual narrative for Fantastic Furniture (at [611]–[619]) above.[1067] Neither Mr Mitchell nor Ms Smith were shown, nor consulted about the contents of, the announcement before it was released to the ASX.[1068] However, on 23 August 2017, Mr Macdonald did send an email to Ms Smith, which she then forwarded to Mr Mitchell, in which he stated:

> Just wanted to drop you a quick note to let you know as part of being a public company and GetSwift's continuous disclosure requirements with the ASX, we have to notify them of any client agreements that we sign. Nothing needed on your end here and this is more of a courtesy email to give you the heads up that we will have to notify ASX this week.[1069]

670 On 23 August 2017, Mr Hunter instructed Mr Mison by email (copied to Mr Macdonald) to submit the Fantastic Furniture & Betta Homes Announcement to the ASX for release to the market,[1070] which he did.[1071] As to Betta Homes it recorded:

> GetSwift Limited (ASX: GSW) ('GetSwift' or the 'Company'), the SaaS solution company that optimises delivery logistics world-wide, is pleased to announce that it has signed exclusive commercial multi-year agreements with BETTA Home Living (Betta.com.au) and Fantastic Furniture (Fantatsticfurniture.com.au).
>
> BETTA Home Living has grown to become one of Australia's largest appliance, furniture and bedding distributors and retailers. Their superstores can be found in every major metropolitan city and regional towns, with 157 stores around Australia.[1072]

671 Ms Smith deposed that, as at 23 August 2017, GetSwift's delivery platform had not been integrated with Shippit's software to allow both systems to operate, that before any trial could be conducted there was technical work to be completed by Shippit to facilitate the integration of GetSwift's platform, and that this work had not been completed at the time the Fantastic

[1067] See also: GSW.0019.0001.6323 attaching GSW.0019.0001.6325; GSW.0019.0001.6514 attaching GSW.0019.0001.6515; GSWASIC00012900 attaching GSWASIC00012901; GSWASIC00012898; GSWASIC00012800 attaching GSWASIC00012801.
[1068] Mitchell Affidavit (GSW.0009.0005.0001_R) at [22], and [26]; Smith Affidavit (GSW.0009.0009.0001_R) at [25].
[1069] GSW.1024.0002.0026.
[1070] GSW.0019.0001.6514 attaching GSW.0019.0001.6515.
[1071] Fantastic Furniture & Betta Homes Announcement (GSW.1001.0001.0789); GSWASIC00012682 attaching GSWASIC00012683.
[1072] Fantastic Furniture & Betta Homes Announcement (GSW.1001.0001.0789) (emphasis altered).

Furniture & Betta Homes Announcement was made.[1073] Ms Smith further deposed that as at 23 August 2017, she had not (and she was not aware of anyone else at Betta Homes having) agreed with any representative of GetSwift that GetSwift's platform was operating effectively or that it was available for Betta Homes' use.[1074] Betta Homes was still waiting for GetSwift and Shippit to arrange for integration of their two respective systems from their end.[1075]

Implementation of the Betta Homes Agreement

672 Following the release of the Fantastic Furniture & Betta Announcement, Ms Smith had telephone calls with Mr Macdonald about the technical integration work that Shippit would need to complete before any trial could commence.[1076]

673 A video call was organised between Mr Macdonald, Mr On and Ms Smith which took place on 5 September 2017.[1077] During that call, it was recognised that "the ball was in Shippit's court in terms of the integration".[1078]

674 On 6 October 2017, Ms Smith sent an email to Mr Macdonald in which she stated, "[j]ust following up on how this integration is going and when we will be in a position to begin UAT?" ("UAT" being "user acceptance testing", which would take place just before the trial period would start).[1079] Ms Smith did not receive a response to her email from Mr Macdonald.[1080]

675 Also 6 October 2017, Mr Clothier sent an email to Mr Macdonald in which he stated, "[I] have not seen any correspondence with Betta. How far are we with Shippit?",[1081] to which Mr Macdonald replied, "[i]ntegration is currently happening with Shippit".[1082]

676 On 9 October 2017, Ms Smith sent a further email to Mr Macdonald (and others), asking for a call to catch up on the project.[1083] The following day, Mr On replied (copied in Mr Hango-zada)

[1073] Smith Affidavit (GSW.0009.0009.0001_R) at [7], [27], and [29].
[1074] Smith Affidavit (GSW.0009.0009.0001_R) at [28].
[1075] Smith Affidavit (GSW.0009.0009.0001_R) at [28].
[1076] Smith Affidavit (GSW.0009.0009.0001_R) at [7], [29].
[1077] GSWASIC00011068; T662.43–663.26 (Day 9).
[1078] T663.45–46 (Day 9).
[1079] GSWASIC00007495 at 7497.
[1080] Smith Affidavit (GSW.0009.0009.0001_R) at [31].
[1081] GSWASIC00007760.
[1082] GSWASIC00007760.
[1083] GSWASIC00007495.

indicating that he had a call with Mr Macdonald the next morning and suggested a call with Ms Smith to provide her with an update.[1084] Ms Smith could not recall whether that call took place.[1085]

677 On 20 October 2017, Mr Macdonald sent an email to Ms Smith in which he stated:

> Quick update. We are waiting on shippit [*sic*] to integrate with GetSwift. We offered to do it but apparently they have to do it on their end. Have they kept you in the loop? Do we know a start date here?[1086]

678 On 25 October 2017, Mr Ron Makins of Shippit sent an email to Mr Macdonald (copied to Mr On), in which he stated: "I believe the BETTA integration will go ahead but they've delayed the go live until next year because of xmas period".[1087]

679 After 20 October 2017, Ms Smith and Mr Mitchell did not receive any further correspondence or telephone calls from Mr Macdonald or anyone else at GetSwift in relation to the integration or the trial. Nor was Ms Smith aware of anyone else at Betta Homes having had any contact with anyone at GetSwift since 20 October 2017.[1088]

680 On 15 December 2017, Ms Smith sent an email to Mr On (copied to Mr Macdonald), in which she stated:

> Can I get an update on how this integration is going. We now have 3 retailers trialling shippit [*sic*] with more soon to be added. They are all pretty excited to get the GetSwift part of the puzzle working.
>
> Can I please get a project timeline on when this is expected to be delivered?[1089]

681 Between late December 2017 and late January 2018, Ms Smith exchanged emails with representatives of Shippit, including Mr On, seeking an update on progress with the integration between the GetSwift and Shippit systems.[1090]

[1084] GSWASIC00007495.
[1085] Smith Affidavit (GSW.0009.0009.0001_R) at [35].
[1086] GSW.1024.0002.0014.
[1087] GSWASIC00005919.
[1088] Smith Affidavit (GSW.0009.0009.0001_R) at [36]–[38]; Mitchell Affidavit (GSW.0009.0005.0001_R) at [28].
[1089] GSW.1024.0002.0017.
[1090] GSW.1024.0002.0022.

682 On 19 January 2018, the Australian Financial Review published a story entitled "GetSwift: Too Fast For its Own Good".[1091] On 23 January 2018, Ms Smith received a telephone call from Mr On, during which he said words to the effect of "[j]ust so you know, we are putting the integration with GetSwift on ice", because Shippit no longer wanted to partner with GetSwift in the light of the news story.[1092] Ms Smith deposed that, following her telephone call with Mr On, because Betta Homes "needed to provide a GPS tracking solution for its drivers, I had to go back to the drawing board with Shippit to identify another company who could provide that solution".[1093]

683 However, Ms Smith did not communicate with GetSwift about the position that had been communicated to her by Shippit.[1094] She explained that she "did not see the need to get in touch with anyone at [GetSwift] because, to date, any work in relation to the preparation for integration had been conducted between Shippit and GetSwift without reference to [her]".[1095]

684 Ms Smith deposed: by 23 January 2018, integration between the GetSwift Platform and the Shippit software system had not occurred; she had not (and she was not aware of anyone else at Betta Homes having) agreed with any representative of GetSwift that GetSwift's platform was operating effectively or that it was available for Betta Homes' use; and Betta Homes was still waiting for GetSwift and Shippit to arrange for integration of their two respective systems from their end.[1096] As at 23 January 2018, Betta Homes had not completed (or even started) any trial of the GetSwift Platform; nor had Betta Homes made any deliveries using the GetSwift Platform.[1097] Ms Smith further deposed that she had not contacted anyone at GetSwift since her email to Mr Macdonald on 15 December (see [680]), that she was not aware that anybody else at Betta Homes had contacted GetSwift since that time, and that, as far as she was aware, all communications between Betta Homes and GetSwift had ceased.[1098] This is consistent with Mr Mitchell's evidence, who explained that, as at 23 August 2017, Betta Homes had not agreed

[1091] GSW.0003.0004.0001.
[1092] Smith Affidavit (GSW.0009.0009.0001_R) at [40].
[1093] Smith Affidavit (GSW.0009.0009.0001_R) at [42].
[1094] Smith Affidavit (GSW.0009.0009.0001_R) at [43].
[1095] Smith Affidavit (GSW.0009.0009.0001_R) at [43].
[1096] Smith Affidavit (GSW.0009.0009.0001_R) at [44].
[1097] Smith Affidavit (GSW.0009.0009.0001_R) at [44].
[1098] Smith Affidavit (GSW.0009.0009.0001_R) at [44].

that the GetSwift Platform was operating effectively or that it was available for Betta Homes' use as integration between the GetSwift platform and the Shippit software system had not yet occurred.[1099] Indeed, Mr Mitchell deposed that he had not had contact with anyone at GetSwift since 23 August 2017.[1100]

G.1.10 *Bareburger Group LLC*

685 Bareburger LLC (**Bareburger**) operated a food delivery business on the east coast of the United States, with a predominant presence in the New York City area.[1101]

Negotiation of the Bareburger Agreement

686 On 30 May 2017, discussions began between Mr Macdonald and Mr Paul Zarmati, Director of IT for Bareburger, about the possibility of Bareburger using the GetSwift platform.[1102] The Bareburger Agreement, and the amendments to it, were negotiated by Mr Macdonald for GetSwift and Mr Zarmati, predominantly by emails which were copied to Mr Hunter.

687 On 21 June 2017, Mr Macdonald sent an email to Mr Zarmati regarding a "1 page term sheet", which was to constitute the agreement between Bareburger and GetSwift.[1103] In this email, Mr Macdonald stated:

> … As promised I am attaching our simple 1 page term sheet with the guaranteed pricing discount for you.
>
> By way of next steps - I believe would be [*sic*] for us to get this 1 pager signed off, then can commence all the integrations to then kick off the trial.[1104]

688 On 30 June 2017, Mr Zarmati replied raising queries in relation to a number of the clauses in the draft term sheet:

> In Section 4-for the initial term, can we please have a separate sheet for this.
>
> In Section 6- Can you please elaborate on what you could consider reasonable, this seems up to interpretation.
>
> Under 'Term and Termination' please remove the automatic renewal clause, we would

[1099] Mitchell Affidavit (GSW.0009.0005.0001_R) at [23].
[1100] Mitchell Affidavit (GSW.0009.0005.0001_R) at [28].
[1101] Bareburger Announcement (GSW.1001.0001.0795).
[1102] GSWASIC00019009.
[1103] GSWASIC00017850 attaching GSWASIC00017850.
[1104] GSWASIC00017850.

need to discuss internally after the POC is over before going full steam ahead.[1105]

689 On 5 July 2017, Mr Macdonald sent an email to Mr Zarmati attaching an updated draft of the term sheet.[1106] The term sheet attached contained the following clauses:

> Clause 3 – Service:
>
> Client exclusively engages GetSwift to provide the following services (the "Services") and GetSwift accepts such engagement:
>
> - Use of GetSwift's proprietary software platform to provide Client with logistics management, tracking, dispatch, route and reporting of delivery operations, including provision of SMS alerts, related reports and system data dumps; and
> - Consultancy advice in relation to the Services in a reasonable number of meetings as Client reasonably requests.
>
> …
>
> Clause 4 – Term:
>
> 37 months (comprised of a trial period plus the initial term), as follows:
>
> - Trial Period - (Includes 30 days free) Expires August 15th, 2017, client to notify GetSwift within 30 days after expiry of trial if they wish to engage for the initial terms and conditions including pricing. Should the client not agree to the initial terms and conditions within 30 days after the expiry of the trial period, GetSwift cannot guarantee the same pricing and terms as outlined.[1107]

690 On 14 August 2017, Mr Zarmati introduced Mr Macdonald to representatives of Toast, Inc (**Toast**).[1108] Toast is a POS (point of sale) platform for restaurants and hospitality businesses primarily based in the United States.[1109] Bareburger required GetSwift to integrate the GetSwift Platform with the Toast platform in order for Bareburger to use the GetSwift Platform and conduct the trial.[1110]

691 On 15 August 2017, Mr Macdonald sent an email to Mr Zarmati regarding the draft term sheet between GetSwift and Bareburger. In this email, Mr Macdonald stated:

> Thanks for making the intro to the Toast team! We are really excited to get this going

[1105] GSWASIC00017062.
[1106] GSWASIC00017062 attaching GSWASIC00017065.
[1107] GSWASIC00017065 (emphasis omitted).
[1108] GSWASIC00040273.
[1109] GSW.1001.0001.0159.
[1110] GSWASIC00040273; GSWASIC00031054 at 1056.

> As a final piece to this engagement we will need to get our term sheet executed so we can then allocate resources to support the Toast integration as well as configuring the Bareburger account so we can commence together
>
> Can you please review and if all ok sign the attached before our initial call with Toast on Thursday?[1111]

692 On 17 August 2017, Mr Zarmati sent an email to Mr Macdonald (copied to Mr Hunter) attaching a signed document entitled "Term Sheet", which he had signed on behalf of Bareburger.[1112] In this email, Mr Zarmati stated "[s]orry just saw this. I signed it quickly, hope its [*sic*] not too late".[1113]

693 The Term Sheet attached to Mr Zarmati's email was dated 22 June 2017, and contained the following clause:

> Clause 4 – Term
>
> 37 months (comprised of a trial period plus the initial term), as follows
>
> - Trial Period - (Includes 30 days free) Expires August 1st, 2017
> - Initial Term·- 36 month Initial Term to start no later than lst August 2017 to 1st of August 2020 - at least 7 days prior to the expiration of the trial period, the Client must by notice in writing (to be given to GetSwift) elect if it does not wish to continue this Agreement for the further initial term period of 36 months, commencing immediately following the expiration of the trial period. If no notice in writing is, issued to GetSwift then the initial term will automatically commence on August 1st 2017.[1114]

694 However, as it turned out, the term sheet signed by Mr Zarmati was not the most recent draft of that document sent to him by Mr Macdonald; the most recent draft being dated 5 July 2017. Recognising this, on 18 August 2017, Mr Macdonald sent an email to Mr Hunter in relation to the Term Sheet signed by Mr Zarmati, in which he stated:

> He signed the wrong one with old date.
>
> We will need the revised date one signed that I sent earlier in this thread or do you have another suggestion?[1115]

[1111] GSWASIC00040273.
[1112] GSWASIC00040273 attaching GSWASIC00057094.
[1113] GSWASIC00040273.
[1114] GSWASIC00057094.
[1115] GSWASIC00040228.

695 Later that evening, Mr Hunter responded to Mr Macdonald's email, stating, "[e]mail stating addendum to dates that's all".[1116] Mr Macdonald did so, sending an email to Mr Zarmati (copied to Mr Hunter), attaching a counter signed term sheet.[1117] In this email, Mr Macdonald outlined the terms of the proposed addendum, which included a "Trial Period" expiring on 1 October 2017 and an "Initial Term" of 36 months would commence unless Bareburger gave notice, at least seven days prior to the expiration of the trial period that it did not wish to continue with the agreement.[1118] The signed "Term Sheet" and the addendum contained in Mr Macdonald's email to Mr Zarmati of 19 August 2017, together constitute the agreement between GetSwift and Bareburger (**Bareburger Agreement**).[1119]

Preparation and release of the Bareburger Announcement

696 On 5 July 2017, Mr Hunter sent an email to Mr Macdonald attaching a draft announcement concerning GetSwift's entry into an agreement with Bareburger.[1120] This draft announcement stated, among other things:

> GetSwift Limited (ASX: GSW) ('GetSwift' or the 'Company'), the Saas solution company that optimises delivery logistics world-wide, is pleased to announce that it has signed a [*sic*] exclusive commercial multi-year agreements [*sic*] with Bareburger.com.[1121]

697 On 6 August 2017, Mr Hunter sent an email to Messrs Macdonald and Ozovek, attaching an updated draft announcement concerning GetSwift's entry into an agreement with Bareburger, for their review.[1122] Mr Ozovek provided minor comments while Mr Macdonald did not respond.[1123]

698 On 7 August 2017, Mr Hunter sent an email to Mr Polites of M+C Partners (copied to Mr Macdonald), regarding, among other things, the draft announcement concerning GetSwift's entry into an agreement with Bareburger. In this email, Mr Hunter stated:

> ok thanks - we may have (waiting for contracts) a slew of new deals to announce in

[1116] GSWASIC00040228.
[1117] GSWASIC00040196 attaching Bareburger Agreement (GSWASIC00057004).
[1118] GSWASIC00040196 attaching Bareburger Agreement (GSWASIC00057004).
[1119] GSWASIC00040196 attaching Bareburger Agreement (GSWASIC00057004).
[1120] GSWASIC00017094 attaching GSWASIC00017095.
[1121] GSWASIC00017095.
[1122] GSWASIC00057420 attaching GSWASIC00040780.
[1123] GSWASIC00057420 attaching GSWASIC00040780; GSWASIC00057422; GSWASIC00057416.

> the next few weeks. Can send you announcements to review and to provide feedback with the caveat that not all contracts are in hand (so please dont [*sic*] count on it just yet - timing may be off) and this is under the strictest embargo of course. Deal?[1124]

699 Following this, on the same day, Mr Hunter sent a further email to Mr Polites (copied to Mr Macdonald), attaching the draft announcement concerning GetSwift's entry into an agreement with Bareburger. Mr Hunter stated: "no releases until after earnings season then, pls [*sic*] review the following and provide feedback :) Much more to come.....holding off on them".[1125]

700 On 24 August 2017, Mr Hunter sent an email to Ms Hughan of M+C Partners (copied to Mr Macdonald), attaching, among other things, a further draft announcement concerning GetSwift's entry into the Bareburger Agreement.[1126] In the email, Mr Hunter states:

> …
>
> Ps one more big parteership [*sic*] just got signed. We can release when ready - if you can provide some suggestions it would help. The scale is pretty big .
>
> We have another smaller one, but a great brand name, and we will be announcing a titan in his field joining our advisory board (and have a another one lined up thats a Aussie local and was featured in Vogue for example)
>
> You must admit we keep you guys interested and it never boring :)[1127]

701 On 26 August 2017, Mr Hunter sent an email to Mr Macdonald listing the announcements to the ASX which GetSwift proposed to make in the future, and the order in which they were to be made. This list included, under the heading "Next week", the words "Bare burger".[1128] Mr Macdonald responded to this email on the same date stating that he agreed with the order of the proposed announcements to the ASX.[1129]

702 On 28 August 2017, Mr Hunter sent an email to Mr Eagle, Mr Macdonald and Ms Gordon attaching a draft announcement regarding Bareburger.[1130] The subject line of Mr Hunter's

[1124] GSW.0019.0001.6281.
[1125] GSW.0019.0001.6281 attaching GSW.0019.0001.6290, GSW.0019.0001.6288, and GSW.0019.0001.6293.
[1126] GSWASIC00012594 attaching GSWASIC00012599.
[1127] GSWASIC00012594.
[1128] GSWASIC00012057.
[1129] GSWASIC00011727.
[1130] GSWASIC00056734 attaching GSWASIC00039728.

email was "Please review and approve".[1131] Mr Eagle replied to Mr Hunter's earlier email with amendments to the draft announcement.[1132]

703 In the morning of 29 August 2017, Mr Hunter sent an email to Mr Macdonald and Messrs Jared O'Connel, Mr Amron D'Silva and Mr Cameron Leslie of Union Square Capital, a private equity advisory firm, attaching a draft announcement concerning GetSwift's entry into the Bareburger Agreement.[1133] In this email, Mr Hunter stated, "[t]his will go out soon. Probably either just before the FY17 report (Aug 31st) or right after. Comments are welcome".[1134] Later that morning, Mr Hunter sent an email to Messrs Macdonald and Eagle and Ms Gordon, attaching a draft announcement concerning GetSwift's entry into the Bareburger Agreement and stated, "[t]his will go out tomorrow barring any developments".[1135]

704 On the evening of 29 August 2017, Mr Eagle emailed Mr Banson (copied to Mr Hunter and Mr Macdonald), attaching the Bareburger announcement and instructing Mr Banson "release" it as "price sensitive".[1136]

705 At 6:07am on 30 August 2017, Mr D'Silva sent an email to Messrs Hunter and Macdonald, attaching an amended draft announcement concerning GetSwift's entry into the Bareburger Agreement.[1137] In this email, Mr D'Silva stated:

> Thank you for your email and for sending us this announcement to review. Congrats on the announcement firstly! Bareburger is a fantastic, growing chain and just the kind of company that is fantastic to align the GetSwift brand with! Im actually a big fan of the food! And next to Sweetgreens is probably my fave restaurant franchise in NYC! (p.s. I'm going to try and get Sweetgreens obviously with GSW too! :))
>
> I've attached our suggestions on the bareburger announcement for your review.[1138]

706 At 6:13am on 30 August 2017, Mr Hunter sent an email to Messrs Macdonald and Eagle and Ms Gordon, attaching a further draft announcement concerning GetSwift's entry into the

[1131] GSWASIC00056734.
[1132] GSWASIC00056733 attaching GSWASIC00039715.
[1133] GSWASIC00056739 attaching GSWASIC00039788.
[1134] GSWASIC00056739.
[1135] GSWASIC00056734 attaching GSWASIC00039728.
[1136] GSWASIC00056580 attaching GSWASIC00039628.
[1137] GSWASIC00056594 attaching GSWASIC00039631.
[1138] GSWASIC00056594.

Bareburger Agreement.[1139] This version incorporated changes made by the "US based corp guys", whom appear to be the advisers from Union Square Capital. In this email, Mr Hunter stated "[t]he next announcement after the FY17 release will be big. This one goes out today with a price sensitive marker".[1140] At 7:13am that day, Mr Macdonald sent an email to Messrs Hunter, Eagle and Banson, attaching the final draft announcement, instructed Mr Banson to mark the announcement as "market sensitive" and for it to be released "15 mins [*sic*] before market open".[1141]

707 At 7:28am, Mr Macdonald sent an email to Mr Zarmati (copied to Mr Hunter), informing Mr Zarmati that GetSwift would be submitting an announcement to the ASX concerning the Bareburger Agreement. In this email, Mr Macdonald stated:

> Also, quick update: as we are a public company, we have to notify the Australian Stock (*sic*) Exchange (ASX) when we enter into commercial agreements, so just wanted to give you heads up that we will submit something to the ASX as part of our continuous disclosure obligations to them. Nothing needed on your end here and this is more of a courtesy email to give you the heads up.
>
> Please let me know if you need anything in the interim and we look fwd [*sic*] to ramping up with you guys shortly![1142]

708 At 9:32am, Mr Banson sent an email to the MAO at the ASX (copied to Messrs Eagle, Hunter and Macdonald), attaching an announcement concerning GetSwift's entry into the Bareburger Agreement.[1143] In the email, he stated: "As discussed, please ensure the attached announcement is marked as 'price sensitive' upon release. The announcement will be released on the portal shortly".[1144] At 9:36am the ASX released, the announcement concerning GetSwift's entry into the Bareburger Agreement (**Bareburger Announcement**).[1145] The Bareburger Announcement, which was marked price sensitive, relevantly stated that GetSwift had "signed an exclusive commercial multi-year agreement with Bareburger.com". At 9:40am, Mr Banson

[1139] GSWASIC00056588 attaching GSWASIC00039630.
[1140] GSWASIC00056588.
[1141] GSWASIC00039622 attaching GSWASIC00039624, and GSWASIC00039626 (emphasis in original).
[1142] GSWASIC00011462.
[1143] GSWASIC00039611 attaching GSWASIC00039612.
[1144] GSWASIC00039611.
[1145] Bareburger Announcement (GSW.1001.0001.0795); Agreed Background Facts (GSW.0002.0002.0001) at [71].

sent an email to Messrs Eagle, Hunter and Macdonald confirming that the Bareburger Announcement had been released by the ASX and marked as "price sensitive".[1146]

Integration with Toast

709 On 12 September 2017, Mr Zarmati sent an email to Mr Macdonald requesting an update on the progress of the integration between GetSwift and Toast.[1147]

710 On 16 September 2017, Mr Macdonald sent an email to Mr Hunter regarding a number of problems GetSwift had encountered in progressing the integration between GetSwift and Toast. In this email, Mr Macdonald stated:

> Okay so his scope has dramatically changed.
>
> First - he wants us to build a connection between all of his 3rd party ordering sites (10+ integrations!!!!!) and Toast which we (GetSwift) would get no transactional benefit from and we wouldn't be able to kick off the POC from that because we still need to connect GetSwift to Toast
>
> Then he wants us to connect to Toast so he can then begin GetSwift POC.
>
> His scope has changed and I need to put a stop to it as the cleanest way to do this is to connect to Toast first by which we can start the POC, then later we can look to connect all 3rd parties.
>
> …
>
> The cleanest way for us to GetSwift to POS is to connect to Toast and he can go live after that with GetSwift.[1148]

711 Later that day, Mr Macdonald sent an email to Mr Zarmati addressing the issues with the Toast integration, and outlining what was required in order for Bareburger to commence the "POC" trial period under the Bareburger Agreement:

> Originally we discussed to get the POC/Trial up and running and you testing out in field with drivers etc. we would need to connect GetSwift to Toast so all orders could come from Toast to GetSwift.
>
> …
>
> As per our agreement to get the delivery management POC up and running, we will be connecting to Toast first. This will then enable you to kick off the GetSwift delivery

[1146] GSWASIC00056576.
[1147] GSWASIC00031054 at 1056.
[1148] GSWASIC00031054.

management POC out in the field immediately.[1149]

712 On 15 November 2017, Mr Ozovek sent an email to Mr Zarmati regarding the proposed integration between GetSwift and Toast.[1150] On or around 21 November 2017, GetSwift signed an agreement with Toast, which was announced to the ASX in December 2017.[1151]

713 On 21 November 2017, Mr Ozovek sent an email to Ms Marissa Polichene and Messrs Jason Messrs, Ming-Tai Huh and Frank Chen of Toast (copied to Mr Zarmati and Mr Macdonald), in which he stated: "Please note that the Toast agreement is signed from my end. We would like next steps so we can move this along and deliver to Bareburger".[1152]

G.1.11 *NA Williams*

714 NA Williams provides sales, marketing, consulting, research, training, call centre and merchandising services in the "automotive aftermarket" industry.[1153] The automotive aftermarket industry deals with car parts that are sold to repair facilities or individuals ("do-it-yourselvers") after the car is initially sold. NA Williams represents manufacturers, retailers and distributors of automotive replacement parts, chemical, accessories, tools and equipment across North America.[1154] NA Williams performs the manufacturers or the suppliers' sales function, and is typically paid a commission; that is, NA Williams receives a percentage of what the manufacturers and suppliers sell to the wholesalers, distributors and retailers.[1155]

715 Major automotive companies that operate across North America, to whom NA Williams sells, are known as "National Accounts", and include AutoZone, O'Reilly Auto Parts, Fleet Pride, Advance Auto Parts/CARQUEST, Auto Plus/Pep Boys and NAPA Auto Parts (whose parent company is Genuine Parts Company (**GPC**)).[1156] In 2017, Autozone, O'Reilly Auto Parts, Advance Auto Parts and NAPA Auto Parts had a combined market share of around 35 per cent

[1149] GSWASIC00031017 at 1018.
[1150] GSWASIC00037225.
[1151] GSW.1001.0001.0159.
[1152] GSWASIC00034420.
[1153] Affidavit of Roger Lee McCollum sworn 14 May 2019 (**McCollum Affidavit**) (GSW.0009.0035.0001_R) at [10].
[1154] McCollum Affidavit (GSW.0009.0035.0001_R) at [10]: T841.29–45 (Day 12).
[1155] T842.4–18 (Day 12).
[1156] McCollum Affidavit (GSW.0009.0035.0001_R) at [13].

of the automotive aftermarket, meaning a combined 35 per cent share of the revenue from the sale of car parts to repair facilities and 'do-it-yourselvers'.[1157] NA Williams sell products of the businesses it represents to distributors and retailers in the United States, Mexico and, to a much smaller extent, Canada.[1158]

716 NA Williams has had dealings with each of the National Accounts for many years. For example, NA Williams has been working with GPC for over 75 years and O'Reilly for around 35 years.[1159] NA Williams has a separate sales team for each National Accounts and the sales representatives know their accounts "extremely well".[1160] Having worked with NA Williams for more than 35 years, Mr Roger McCollum, the Chairman and CEO of NA Williams, personally knew many of the senior executives of each of those National Accounts.[1161]

717 Mr McCollum said NA Williams has a "consultative relationship" NA Williams with its customers,[1162] such that NA Williams is a "credible source of information to those customers … that is, when [NA Williams] bring[s] programmes or promotions or new opportunities to them, [NA Williams] is typically viewed as being a credible source of information".[1163]

718 In late 2017, NA Williams had roughly 120 sales representatives, located throughout the United States and in Mexico.[1164] The next largest automotive aftermarket salesforce was "appreciably smaller, perhaps by half".[1165] The volume of sales made by businesses NA Williams represented in 2017 was estimated by Mr McCollum to be USD 1.2–1.3 billion.[1166]

[1157] T843.7–12 (Day 12).
[1158] T842.20–28 (Day 12).
[1159] T844.15–22 (Day 12).
[1160] T844.24–34 (Day 12).
[1161] T846.20–27 (Day 11).
[1162] GSWTB0022.
[1163] T845.26–38 (Day 12).
[1164] T843.22–33 (Day 12).
[1165] T843.37–45 (Day 12).
[1166] T844.1–3 (Day 12).

GetSwift's approach to Genuine Parts Company

719 To provide context to the NA Williams narrative, it is necessary to say something about GetSwift's engagement with GPC. In May 2017, GetSwift submitted a response to a Request for Proposal issued on 10 March 2017 by GPC, a major customer of NA Williams.[1167]

720 On 15 May 2017, Mr Hunter was notified by Mr Bruce Richards, the Director In-Store Technology of GPC, that GetSwift had not been selected by GPC. Mr Richards explained in his covering email that, among other things:

> After careful evaluation, we've determined your base product and reporting are not as robust as other solutions we have been testing and believe it would require extensive modifications to have it compare to the product we've selected.
>
> …
>
> We regret to inform you the proposal from GetSwift was not selected for award.[1168]

721 Later that day, Mr Hunter forwarded the email from Mr Richards to Mr Macdonald.[1169]

First contact between NA Williams and GetSwift

722 In about July 2017, Mr Terry White called Mr McCollum, and informed him that he was acting as an advisor to GetSwift and that GetSwift was a logistical tracking company contemplating entering the automotive market or attempting to solicit business in the automotive market.[1170] Mr White and Mr McCollum have known each other for much of Mr McCollum's career as Mr White was previously an executive with GPC.[1171] Over the phone, although it might be thought the comparison is less than perfect, Mr White told Mr McCollum that GetSwift's business was akin to "Uber" in that it provides both delivery routing and delivery visibility to customers.[1172]

[1167] GSWASIC00019670.
[1168] GSWASIC00019670 attaching GSWASIC00019671.
[1169] GSWASIC00019664 attaching GSWASIC00019666.
[1170] McCollum Affidavit (GSW.0009.0035.0001_R) at [16].
[1171] McCollum Affidavit (GSW.0009.0035.0001_R) at [1], and [15]; T847.38–848.1 (Day 12).
[1172] McCollum Affidavit (GSW.0009.0035.0001_R) at [17].

723 Mr McCollum respected Mr White as a person with a lot of knowledge and experience of the automotive aftermarket industry, particularly of the business of GPC.[1173] Indeed, Mr McCollum agreed that Mr White would know more than him about GPC's business.[1174]

27 July 2017 meeting

724 On 27 July 2017, Mr White, Mr Hunter and Mr Macdonald met with Mr McCollum.[1175] The meeting had been organised by Mr White.[1176]

725 At this meeting, Mr Macdonald gave an overview of GetSwift's business, including mentioning some of GetSwift's existing clients such as Pizza Hut. Mr Macdonald also delivered a presentation as to how GetSwift considered it could benefit NA Williams' customers.[1177] Mr McCollum was favourably impressed by the demonstration and could see how the platform could benefit NA Williams' customers.[1178]

726 Further, Mr McCollum provided an overview of NA Williams' business model, advising Mr Hunter, Mr Macdonald and Mr White that NA Williams: has no involvement in its customers' delivery operations; does not place its label on products, and does not buy or take possession of goods; did not know what delivery systems, if any, its customers were using to manage their delivery operations; did not know whether NA Williams' customers would be interested in the product, but that NA Williams could assist in exposing its customers to GetSwift.[1179] Indeed, Mr McCollum told the others that NA Williams could not promise they would be able to sell anything as they could only expose GetSwift's product to the major players in the industry.[1180]

727 Mr White said GetSwift had already presented to GPC and said that GPC was "currently considering" if GetSwift's delivery software would benefit its business.[1181] However, this does

[1173] T848.3–6 (Day 12).
[1174] T848.11–12 (Day 12).
[1175] GSWASIC00014851; McCollum Affidavit (GSW.0009.0035.0001_R) at [19].
[1176] T847.30–36 (Day 12).
[1177] McCollum Affidavit (GSW.0009.0035.0001_R) at [19].
[1178] T848.33–849.41 (Day 12).
[1179] McCollum Affidavit (GSW.0009.0035.0001_R) at [19].
[1180] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(c)].
[1181] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(d)].

not appear to be consistent with the notification that Mr Hunter had received from GPC on 15 May 2017, referred to above (at [720]).

728 Mr McCollum accepted that NA Williams tries not to represent to its customers products that it does not think are right for them, and that he would not have agreed to represent GetSwift if he did not think its platform could be of benefit to NA Williams customers.[1182]

729 Mr White, Mr Hunter, Mr Macdonald and Mr McCollum discussed the likely price per transaction GetSwift would charge NA Williams' customers, other than GPC, if the customers were to engage GetSwift.[1183] Mr Macdonald stated that it would be likely that a price of eight to 15 cents per transaction would be appropriate for National Accounts. Mr McCollum did not suggest a price which he considered that the National Accounts customers or any other NA Williams customers might be willing to pay. There was no agreement reached on any specific price for each delivery at this meeting, or at any subsequent meeting.[1184] It was discussed that if any future arrangement was reached between GetSwift and NA Williams, NA Williams would be compensated by GetSwift for introducing the GetSwift product to NA Williams' customers and for NA Williams providing after sales services on behalf of GetSwift (by way of a percentage of each transaction charged).[1185] Nevertheless, Mr McCollum understood that NA Williams would not provide sales and marketing services to GetSwift in relation to GPC because of their pre-existing relationship.[1186]

730 Notwithstanding that Mr McCollum recalled in his affidavit that Mr Macdonald suggested a range of between eight and 15 cents per delivery for National Accounts, he did not disagree that the amount Mr Macdonald actually put forward was a range of 10 to 15 cents.[1187] Nor would he have cavilled with the figure being put forward for customer's generally and not just national accounts.[1188] Nonetheless, as discussed above, he did not agree to this price, or any

[1182] T848.44–849.2 (Day 12).
[1183] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)(i)].
[1184] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)(i)].
[1185] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)(ii)].
[1186] T847.7–13 (Day 12).
[1187] T854.24–46 (Day 12).
[1188] T854.38–41 (Day 12).

price, at the meeting in July 2017 or subsequently.[1189] Instead, it was Mr Macdonald who put forward the range of prices per delivery.[1190]

731 Moreover, Messrs White, Hunter, Macdonald and McCollum discussed the potential size (that is, number of transactions) of the delivery business for the North American automotive market. Mr McCollum stated that they speculated as to the size of the North American automotive market, and attempted to estimate, on average, how many deliveries individual stores would make, multiplied by the number of stores each National Accounts had, in order to get a sense of how large the market could be.[1191] Mr McCollum agreed with the proposition that he, Mr Hunter, Mr Macdonald and Mr White "were doing the best on the information that [they] had available to [them] as a group of four people to work out what the size of the market probably was".[1192]

732 The question of the size of the market for GetSwift's platform was something that was approached at the meeting in a number of different ways.[1193] One approach was to quantify the size of the market based on the number of deliveries GPC did annually.[1194] Another approach was to build up from the number of GPC stores, delivery trucks and deliveries per day to calculate the size of the overall market.[1195] Mr McCollum agreed that, although he could not recall the specific figures, the two approaches yielded reasonably consistent market sizes.[1196] That is, they estimated the market share of the National Accounts to be 35%.[1197]

733 Mr McCollum recalled that at the meeting he was told that GetSwift had been in discussions with GPC about supplying the GetSwift platform to it and that there was some discussion at the meeting about the fact that GetSwift had been told by GPC the number of deliveries it did annually.[1198] Mr McCollum later said that he did not recall "hearing that Genuine Parts had

[1189] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)(i)]; T854.24–41 (Day 12).
[1190] MCS at [441(g)].
[1191] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)(iii)]; T850.5–8 (Day 12).
[1192] T850.10–12 (Day 12). See also T867.16–21 (Day 12).
[1193] T850.14–16 (Day 12).
[1194] T854.9–11 (Day 12).
[1195] T853.29–854.15 (Day 12); McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)].
[1196] T854.17–18 (Day 12).
[1197] T843.7–12 (Day 12).
[1198] T850.18–28 (Day 12).

given GetSwift a specific number",[1199] but did not deny that such a number might have been said.[1200] In his affidavit, Mr McCollum deposed, "[w]e also discussed discounting the total addressable market figure to reflect the fact that not all stores provide delivery services, especially for its retail customers".[1201]

734 At the meeting, Mr McCollum and Mr White agreed that GPC made up about 10 per cent of sales in the North American automotive aftermarket industry overall.[1202] As noted above, there was some discussion about the number of deliveries that GPC did annually, although Mr McCollum could not recall that number.[1203] Mr McCollum was "not prepared to dispute" that the figure discussed at the meeting (of the number of deliveries that GPC did annually) was 240 million,[1204] and accepted, as a matter of mathematics, that if the number of deliveries that GPC did annually had been said at the meeting to be 240 million deliveries, then that would yield a total market of 2.4 billion deliveries.[1205] Mr McCollum was also not prepared to dispute that the size of the market discussed at the meeting on 27 July *might* have been as large as 2.4 billion deliveries.[1206]

735 However, it is important to note that the figure for the total addressable market being 2.4 billion deliveries per year does not appear in any evidence, nor is there any evidence that GPC did in fact make 240 million deliveries per year. As noted above, there was evidence that Mr Hunter, Mr Macdonald, Mr White and Mr McCollum "speculated" as to what market share GetSwift could expect to obtain on 27 July 2017 but Mr McCollum's evidence was that he did not recall 2.4 billion being mentioned at the meeting dated 27 July 2017.[1207] Nor could Mr McCollum recall hearing a specific number of GPC's annual deliveries at the meeting on 27 July 2017.[1208]

[1199] T850.37 (Day 12); T850.41–851.3 (Day 12).
[1200] T851.5–10 (Day 12).
[1201] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)].
[1202] T853.29–37 (Day 12); T864.34–35 (Day 12).
[1203] T864.37–39 (Day 12).
[1204] T864.46–865.2 (Day 12).
[1205] T864.41–44 (Day 12).
[1206] T865.4–7 (Day 12).
[1207] T864.41–44 (Day 12).
[1208] T850.35–37 (Day 12); T850.41–851.3 (Day 12).

736 As to Mr White's evidence, Mr McCollum recalled that "Mr White was basing [the number of GPC deliveries] on his experience",[1209] which he viewed as credible, but was still a matter of speculation.[1210] Mr McCollum accepted the proposition that Mr White "is a man whose views you would have accepted as accurate in relation to the number of deliveries done by GPC …. a former executive of GPC with a lot of knowledge of that business".[1211] Mr McCollum explained that it was not until NA Williams had an opportunity to meet with the respective National Accounts (other than GPC with whom GetSwift had already met) that it would have more concrete figures to rely upon in estimating the size of the market.[1212] However, the objective documentary evidence indicates that Mr White, who was present at the 27 July 2017 meeting, only considered GetSwift to be able to obtain 5 million deliveries annually pursuant to the NAW Agreement (as I describe below at [756]),[1213] and Mr Hunter was aware of Mr White's estimation prior to the release of the First NAW Announcement.[1214]

737 The meeting between Mr White, Mr Hunter, Mr Macdonald and Mr McCollum lasted for approximately one and a half hours.[1215] By the conclusion of the meeting, Mr White, Mr Hunter, Mr Macdonald and Mr McCollum had not agreed to any specific timelines for further action; rather they agreed to continue their dialogue with a view to figuring out if NA Williams could add value to GetSwift's efforts in the automotive aftermarket and if GetSwift and NA Williams could reach a mutually beneficial agreement.[1216]

738 On 31 July 2017, Mr Macdonald sent an email to Mr McCollum (copied to Mr Hunter) attaching a presentation GetSwift had prepared for NA Williams and suggested Mr McCollum circulate the presentation internally.[1217]

[1209] T850.39 (Day 12). See also McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)].
[1210] T850.43–46 (Day 12); T853.20–27 (Day 12).
[1211] T853.20–27 (Day 12).
[1212] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(e)(iii)].
[1213] GSWASIC00031145.
[1214] GSWASIC00031145.
[1215] McCollum Affidavit (GSW.0009.0035.0001_R) at [20].
[1216] McCollum Affidavit (GSW.0009.0035.0001_R) at [20].
[1217] GSWASIC00014503 attaching GSWASIC00063874.

Feedback from NA Williams following the meeting

739 Shortly after the meeting between NA Williams and GetSwift, Mr McCollum spoke to a number of internal NA Williams sales managers of National Accounts.[1218] They had not heard of the GetSwift platform or any similar platform previously, and said that it had the potential to be of considerable benefit to their customers.[1219] Mr McCollum said that the sales managers "felt it was something their customers should know about".[1220] Mr McCollum agreed that the views of the sales managers accorded with the views he had formed about the potential of the platform at the meeting between GetSwift and NA Williams on 27 July 2017.[1221]

740 Not long after speaking with the sales managers, Mr McCollum discussed this feedback he had received with Mr White and/or Mr Macdonald. He communicated that "by and large the concept was received favourably by our customers" and that NA Williams would be excited to move forward with GetSwift.[1222]

Negotiation of the NAW Agreement

741 On 14 August 2017, Mr McCollum sent an email to Mr Macdonald, attaching a draft document outlining the proposed terms of an agreement between NA Williams and GetSwift.[1223] On the same date, Mr Macdonald sent the draft agreement to Mr Eagle, Mr Hunter and Mr Ozovek.[1224] That email stated "Brett, [a]s discussed attached is NA Williams word doc agreement".[1225]

742 On 15 August 2017, Mr Macdonald sent an email to Mr McCollum (copied to Mr Hunter) attaching a marked up version of the proposed agreement for Mr McCollum's review.[1226]

743 On 17 August 2017, Mr McCollum sent Mr Macdonald a further draft of the proposed agreement with his comments in mark up, stating:

> We're okay with everything except for a couple of points and a question or two. I've

[1218] T855.29–35 (Day 12); McCollum Affidavit (GSW.0009.0035.0001_R) at [21].
[1219] McCollum Affidavit (GSW.0009.0035.0001_R) at [21]. See also GSWASIC00057001.
[1220] T855.29–856.8 (Day 12). See also GSWASIC00057001.
[1221] T856.27–29 (Day 12).
[1222] T856.27–37 (Day 12).
[1223] GSWASIC00057210 attaching GSWASIC00057211.
[1224] GSWASIC00059832_R attaching GSWASIC00057029; GSWASIC00057209 attaching GSWASIC00067548.
[1225] GSWASIC00059832_R; GSWASIC00057209.
[1226] GSWASIC00057168 attaching GSWASIC00057169.

> made a few remarks on the agreement. Please review and let me know your thoughts and then we'll get on to the next steps of getting started. I'm in the office tomorrow if that's a good time to connect.[1227]

744 On the same day, Mr Macdonald forwarded Mr McCollum's email to Mr Eagle and Mr Hunter.[1228] Mr Hunter responded with comments in relation to the terms of the contract, specifically in relation to the time for payment, including: "Bottom line though is we cant pay for contracts that dont pay - those are not valuable contract [*sic*]- insert the appropriate language please!"[1229] On 17 and 18 August 2017, Mr Eagle provided his comments on the proposed agreement (which are redacted).[1230] Mr Macdonald told Mr Eagle that his comments were incorporated into the draft agreement.[1231]

745 On 18 August 2017, Mr Macdonald sent an email attaching an updated agreement to Mr McCollum (copied to Mr Hunter) in which he stated that he had accepted all changes.[1232] Mr Macdonald had suggested some further changes that appeared in mark up.[1233]

746 On 18 August 2017, Mr McCollum sent Mr Macdonald a signed copy of the NAW Agreement (copied to Mr Hunter and Mr White).[1234] On 19 August 2017, Mr Macdonald sent a signed counterpart of the NAW Agreement to Mr McCollum (**NAW Agreement**).[1235]

747 Under the NAW Agreement, NA Williams was to be appointed by GetSwift to "provide sales and marketing services" for the GetSwift Platform in the North American Automotive Aftermarket Channel, and NA Williams would be compensated on a commission basis calculated as a percentage of GetSwift's net sales.[1236] NA Williams had no ability to require its customers to use the GetSwift Platform or to use or purchase any other service. NA Williams could only expose or market the GetSwift Platform to its customers.[1237] Clause 13 of the NAW

[1227] GSWASIC00063826 attaching GSWASIC00057046.
[1228] GSWASIC00031779 attaching GSWASIC00057038.
[1229] GSWASIC00031777.
[1230] GSWASIC00031766_R attaching GSWASIC00057029; GSWASIC00059745_R; GSWASIC00031761_R; GSWASIC00059748_R.
[1231] GSWASIC00059745_R.
[1232] GSWASIC00032676 attaching GSWASIC00032677.
[1233] GSWASIC00032676 attaching GSWASIC00032677.
[1234] GSWASIC00032667 attaching GSWASIC00032675, and GSWASIC00032668.
[1235] GSWASIC00032544 attaching NAW Agreement (GSWASIC00032546).
[1236] T846.32–38 (Day 12); GSWASIC00032668.
[1237] McCollum Affidavit (GSW.0009.0035.0001_R) at [24].

Agreement states: "Term. This Agreement shall continue in full force and *effect for a three-year period* from the date this Agreement is entered into as listed in the first paragraph hereof. It will be automatically renewed for an additional one-year period unless the other party notifies its intention not to renew at least 30 days prior to the end of the term. …"[1238]

748 Mr McCollum understood that what was intended by the NAW Agreement was that NA Williams would seek to sell the GetSwift platform and services to the same wholesale distributors and retailers of automotive products to whom NA Williams sought to sell the products of the other businesses that NA Williams represented, including the National Accounts, with perhaps the exception of GPC.[1239]

Circulation of drafts of the First NAW Announcement

749 At 3:52pm on 23 August 2017, Mr Hunter sent an email to Mr Macdonald attaching a draft ASX announcement with respect to the entry by GetSwift into the NAW Agreement.[1240]

750 At 4:40pm, Mr Hunter sent the draft announcement to Mr McCollum and stated "[i]f you would be so kind to review and provide a comment/quote we would be grateful".[1241] The email attached a draft ASX release, which included the following statement:

> The Company and NA Williams expect to transform the delivery services across the automotive sector targeting the established national representation under management: AutoZone, NAPA, Advance Auto Parts, Pep Boys, Truckpro, FleetPride, O'Reilly Auto Parts, and Traction heavy duty among others. NA Williams and The Company estimate that this structure will potentially yield in excess of 1.15 Billion (1,150,000,000) transactions a year when fully implemented. The Company estimates the capture of this vertical will take at least 15-18 months due to the project scope, size and complexity of the channel partners.[1242]

751 When he received this email, Mr McCollum understood that Mr Hunter was asking him to review the draft announcement attached to it and to provide a comment or quote for the announcement.[1243] Shortly after receiving the email from Mr Hunter, Mr McCollum read the

[1238] GSWASIC00032668 (emphasis altered).
[1239] T846.40–847.18 (Day 12).
[1240] GSWASIC00012630 attaching GSWASIC00012631.
[1241] GSWASIC00012626 attaching GSWASIC00012627.
[1242] GSWASIC00012627.
[1243] T859.1–4 (Day 12).

draft announcement.[1244] Mr McCollum gave evidence to the effect that when reviewing the draft announcement, he focussed his attention only on ensuring the description of NA Williams and any comment attributed to him were accurate.[1245] Mr McCollum stated that he did not have particular regard to the fact that the draft NA Williams Announcement was described as an "ASX Release" or to the description of the agreement into which it was said that GetSwift and NA Williams entered.[1246]

752 Mr McCollum gave the following evidence about the draft announcement: (1) when he read the first sentence, he did not disagree with it,[1247] and appreciated that the sentence was making a statement about NA Williams' expectation,[1248] and accepted that he "expected that if the GetSwift platform was as successful as we thought it would be, and we did, we were very excited about going to work for GetSwift";[1249] (2) when he read the second sentence, he understood that what was being put forward by GetSwift in was something that GetSwift said was an estimate made by both it and NA Williams;[1250] (3) he could not recall specifically the estimate that Mr Hunter, Mr Macdonald and Mr White "came up with for the market size when [he] had [his] initial meeting on 27 July";[1251] and (4) if he had thought that the estimate in the second sentence was inaccurate or unreasonable, that is something that he would have raised in his reply to Mr Hunter.[1252]

753 Later that day, Mr McCollum replied stating:

> I'm fine with your description of N.A. Williams as written but I've shown our standard company description that we use in press releases. It may be a bit more descriptive of our services. You may add more detail if you wish. …[1253]

754 Mr McCollum also provided a statement from himself and said:

> In terms of a statement I might make, is the following in line with your thinking?

[1244] T859.6–7 (Day 12); McCollum Affidavit (GSW.0009.0035.0001_R) at [37].
[1245] McCollum Affidavit (GSW.0009.0035.0001_R) at [36]; T860.7–26 (Day 12).
[1246] McCollum Affidavit (GSW.0009.0035.0001_R) at [36].
[1247] T860.28–42 (Day 12).
[1248] T860.33–34 (Day 12).
[1249] T860.34–37 (Day 12).
[1250] T861.38–43 (Day 12); T864.6–10 (Day 12); T865.37–40 (Day 12).
[1251] T862.33–41 (Day 12). See also T864.22–32 (Day 12).
[1252] T865.37–43 (Day 12).
[1253] GSWASIC00012625.

> We're pleased to partner with GetSwift and are excited about introducing the Company's logistics and delivery optimizing solutions to our industry … Delivering the right part to the repair shop as quickly and efficiently as possible is critical to the success of every automotive retail and wholesale operation" …[1254]

755 He otherwise did not comment on the content of the draft ASX release, and in particular, did not comment on the joint estimate of 1.15 billion per year that had been included in the draft announcement, nor the estimate of "15-18 months" in the second sentence.[1255]

756 On 23 August 2017, Mr Hunter sent Mr John Wilson, Advisory Board Member of GetSwift, a copy of a draft of the NA Williams Announcement and stated "Pls provide feedback".[1256] On 24 August 2017, Mr Hunter sent an email to Mr Wilson attaching an updated copy of the draft of the NA Williams Announcement.[1257] Mr Wilson replied, stating:

> … And how did the math get so high on their addressable transactions/year? When I originally asked Terry [White] to estimate, he came up with 5M.
>
> The number is the only risk in the release, so I just wanted to triple check…[1258]

757 On the same date, Mr Hunter responded "I checked with Roger - think of this way, GPC by themselves do more than 240m per year."[1259] Mr Wilson responded to Mr Hunter's email by stating "But the number will likely cause the market response, so I just wanted to check".[1260]

758 In cross-examination Mr McCollum was asked whether, in the discussions with GetSwift, GetSwift had been told by Mr White that GPC did 240 million deliveries annually and Mr McCollum did not recall any discussion to such effect.[1261]

759 On 24 August 2017, Mr Hunter sent Mr McCollum an updated version of the draft of the NA Williams Announcement.[1262] Mr Hunter stated:

> Thank you for your time and for your advice on this. I made just very minor word order tweaks for the Australian audience. Please see enclosed and let me know if anything does not meet your approval. Barring anything extraordinary we would disclose this to

[1254] GSWASIC00012625.
[1255] HCS at [198]; T866.21–22 (Day 12).
[1256] GSWASIC00012633 attaching GSWASIC00012634.
[1257] GSWASIC00012470 attaching GSWASIC00012471.
[1258] GSWASIC00031145.
[1259] GSWASIC00031145.
[1260] GSWASIC00031145.
[1261] T850.22–24 (Day 12); T850.35–851.4 (Day 12); T864.41–44 (Day 12).
[1262] GSWASIC00012446 attaching GSWASIC00012449.

the ASX next week.[1263]

760 The draft ASX release attached to the email from Mr Hunter included was in the following terms:

> The Company and NA Williams expect to transform the delivery services across the automotive sector targeting the established national representation under management: AutoZone, NAPA, Advance Auto Parts, Pep Boys, Truckpro, FleetPride, O'Reilly Auto Parts, and Traction heavy duty among others. NA Williams and The Company estimate that this structure will potentially yield in excess of 1.15 Billion (1,150,000,000) transactions a year when fully implemented. The Company estimates the fulfillment of this vertical will take at least 15-18 months due to the project scope, size and complexity of the channel partners.[1264]

761 Mr McCollum understood when he received this email that Mr Hunter was asking for his approval of the announcement that GetSwift proposed to make and Mr McCollum read the announcement at that time.[1265] Mr McCollum evidence in relation to this revised draft was in effect the same as that given in respect of the first draft: see [750]–[753].[1266] Mr McCollum replied by email, stating, "[t]his looks fine Bane".[1267]

762 Mr Hunter forwarded the email chain to Mr Macdonald.[1268] The email chain sent to Mr Macdonald included the comments that had been provided by Mr McCollum the previous day and indicated to Mr Macdonald that Mr McCollum had raised no objection to the terms of the draft First NA Williams Announcement that Mr Hunter had sent to him.

Consideration of the "1.15 billion" transactions figure

763 Mr McCollum was "not involved" in the preparation of the statements made in the third paragraph of the two announcements subsequently released by GetSwift to the ASX on 12 September 2017 and he did not know how the figure of "1.15 Billion (1,150,000,000) transactions a year" was arrived at.[1269] Mr McCollum assumed that the number came from estimates discussed during their "brainstorming" session on 27 July 2017 or alternatively the number came from other separate discussions that GetSwift may have had about specific

[1263] GSWASIC00012446.
[1264] GSWASIC00012449.
[1265] T867.27–44 (Day 12).
[1266] T868.1–869.20 (Day 12).
[1267] GSWASIC00056884.
[1268] GSWASIC00012446 attaching GSWASIC00012449.
[1269] McCollum Affidavit (GSW.0009.0035.0001_R) at [38(a)].

accounts which were then expanded to include potentially the entire North American aftermarket.[1270] Mr McCollum confirmed that NA Williams had not provided GetSwift with specific independent information, data or research to assist in quantifying the annual number of deliveries for either the entire automotive aftermarket or Channel customers, and Mr McCollum doubts such data exists.[1271] Indeed, the only occasion that Mr McCollum undertook the exercise of estimating the size of the North American delivery business was the "brainstorming" exercise at the meeting on 27 July 2017.[1272]

764 Mr McCollum's view was that the 1.15 billion estimated number may represent the entire addressable volume of North American automotive aftermarket deliveries, but he did not think that NA Williams and GetSwift could potentially capture the entire addressable market under the NAW Agreement.[1273] Mr McCollum stated that the total market share that GetSwift could acquire was dependent on a number of factors including price, product attributes, competition and alternative products, market acceptance, etc.[1274] In Mr McCollum's view, it would have been a big success for GetSwift to capture even five or ten percent market share over a 15 to 18 month period.[1275] Further, Mr McCollum did not know why the ASX release referred to a five year agreement between NA Williams and GetSwift, given the term of the agreement was for three years.[1276]

765 Mr McCollum was subject to close questioning about the statement in the First NAW Announcement that "N.A. Williams and the company estimate that this structure will potentially yield in excess of 1.15 billion transactions a year when fully implemented".[1277] As noted above, Mr McCollum agreed that at the meeting on 27 July 2017, Mr Hunter, Mr Macdonald, Mr White and he came up with an estimate for market size.[1278] Although Mr McCollum did not recall the specific number representing the size of the market arrived at during the meeting on 27 July 2017, Mr McCollum stated that the number was an estimate – it

[1270] McCollum Affidavit (GSW.0009.0035.0001_R) at [38(a)].
[1271] McCollum Affidavit (GSW.0009.0035.0001_R) at [38(b)].
[1272] McCollum Affidavit (GSW.0009.0035.0001_R) at [38(c)].
[1273] McCollum Affidavit (GSW.0009.0035.0001_R) at [40].
[1274] McCollum Affidavit (GSW.0009.0035.0001_R) at [40].
[1275] McCollum Affidavit (GSW.0009.0035.0001_R) at [41].
[1276] McCollum Affidavit (GSW.0009.0035.0001_R) at [50].
[1277] T861.1 (Day 12).
[1278] T862.33–35 (Day 12).

was "a swag or a swing at best" of the total market size of the entire automotive aftermarket and it was not based on data.[1279] He stated that it was not until later, when they spoke to customers, that they "really had any idea of what the real numbers were".[1280]

766 In response to a suggestion that he may not have viewed the 1.15 billion figure at the time he read the draft announcement in August 2017 as being referrable to the size of the total market, he explained:

> No. The truth is I honestly just didn't even consider it. I didn't … even consider whether 1.15 billion was accurate or it … should have been less or would have been more. I really wasn't concerned about it. It didn't occur to me to whom the audience was that this was being sent. I only was concerned about getting my quote correct and having NA Williams portrayed correctly as to what our actual business model is.[1281]

767 Likewise, when it was suggested to him that when he received the draft announcement he in fact regarded it as a reasonable estimate of the potential number of deliveries that might be done over the GetSwift Platform, he made plain:

> That is not correct. I would estimate that this would be a potentially correct number of deliveries that would be available to GetSwift if they captured the entire market as we defined it – we being GetSwift and myself – in the meetings that we held on July 27 and then perhaps subsequently on August 3.[1282]

768 Mr McCollum did not agree that NA Williams and GetSwift together would be able to secure that amount of business, let alone capture the entire market within 15 to 18 months.[1283] In response to a suggestion that if anyone could successfully market a product to the North American automotive aftermarket market industry it was NA Williams, Mr McCollum agreed but noted somewhat pithily that "there is somewhat of a difference between software and auto parts".[1284] Finally, Mr McCollum rejected any suggestion that, when he read the announcement in 2017, he did not believe the estimate of 1.15 billion referred to total market size, and stated: "as I read this then and as I read this now, I would view that as the potential market available to GetSwift".[1285]

[1279] T864.12–30 (Day 12); T866.5–10 (Day 12); T866.35–867.8 (Day 12).
[1280] T867.10–12 (Day 12).
[1281] T865.12–17 (Day 12).
[1282] T866.1–4 (Day 12).
[1283] T862.25–31 (Day 12); T864.19–20 (Day 12); T861.17–25 (Day 12).
[1284] T856.18–22 (Day 12).
[1285] T866.7–10 (Day 12).

GetSwift's knowledge of size of addressable market and competitors' pricing

769 On 5 October 2017, Ms Danielle Sonnefeld of NA Williams sent an email to Mr Macdonald (copied to Mr Hunter), in which she stated that she had a meeting with Advance Auto Parts. She provided her "recap" in which she informed Mr Macdonald and Mr Hunter that Advance Auto Parts did 64 million deliveries in 2016.[1286]

770 On 8 October 2017, Mr Macdonald sent an email to a number of personnel at GetSwift informing them that he had completed a demonstration for O'Reilly Auto Parts and that he was informed O'Reilly Auto Parts do approximately eight million deliveries per month.[1287]

771 On 13 December 2017, Mr Dave Nickerson of NA Williams sent an email to Mr White, which he forwarded to Mr Hunter and Mr Macdonald. In the email, Mr Nickerson reported on a meeting he had with O'Reilly Auto Parts who confirmed that they were undertaking a trial with a platform called Elite Extra. Mr Scott Blackburn stated that the current pricing from Elite Extra was $0.02 per delivery.[1288]

Further GetSwift internal circulation of a draft of the First NAW Announcement

772 On 24 August 2017, Mr Hunter sent an email to Ms Hughan of M+C Partners (copied to Mr Polites of M+C Partners and Mr Macdonald), attaching a draft of the NA Williams Announcement.[1289] In this email, Mr Hunter stated: "… one more big pateership [*sic*] just got signed. We can release when ready - if you could provide some suggestions it would help. The scale is pretty big."[1290]

773 On 26 August 2017, Mr Hunter sent an email to Mr Macdonald, listing the announcements to the ASX which GetSwift proposed to make in the future, and the order in which they were to be made. This list included, under the heading "We examine results, then after that we judge when we can", the words "N.A. W", which appears to be a reference to the proposed announcement concerning GetSwift's entry into the NAW Agreement.[1291] Mr Macdonald

[1286] GSWASIC00008010.
[1287] GSWASIC00055943.
[1288] GSWASIC00053699.
[1289] GSW.0019.0001.6588 attaching GSW.0019.0001.6590.
[1290] GSW.0019.0001.6588.
[1291] GSWASIC00011727.

responded to this email on the same date stating that he agreed with the order of the proposed announcements to the ASX.[1292]

774 On 4 September 2017, Mr Eagle sent an email to Messrs Hunter and Macdonald setting out an action list for the board to address.[1293] Mr Eagle's email did not refer to, or mention, the NAW Agreement, or any announcement in relation to the NAW Agreement to be approved by the board.

775 On 5 September 2017, Mr Hunter sent an email to Mr Eagle, Mr Macdonald and Ms Gordon (with Ms Cox and Mr Ozovek copied) in which he attached a draft of the NA Williams Announcement.[1294] In his email, Mr Hunter stated that the information was "highly sensitive and subject to ASX disclosure rules", he instructed the recipients of the email not to discuss the information with anyone, and he requested comments in relation to "material errors".[1295] On the same day, Mr Eagle commented "Very minor drafting comment only. 3rd para. "Traction heavy duty" – should the H and D also be capitalised? // Nicely done!"[1296] Mr Macdonald said "no comments on my side apart from some formatting using the new template and adjusting Traction Heavy Duty".[1297] Ms Gordon stated "All good from my side// Just need a small formatting change ie put a space above Bane Hunter's name, to make it clear that it's Bane's comment".[1298]

776 On 7 September 2017, Mr Hunter sent the draft First NAW Announcement to Mr Macdonald and Mr Lawrence attached to a blank email with the subject line "Announcement".[1299]

GetSwift dealings with Advance and O'Reilly Auto Parts

777 Between 28 August and 11 September 2017, Mr Hunter and Mr Macdonald sent and received emails regarding the first meeting to be arranged by NA Williams under the NAW Agreement, with auto parts retailer O'Reilly, in Missouri.[1300] Mr McCollum noted that as at 12 September

[1292] GSWASIC00011727.
[1293] GSWASIC00010947.
[1294] GSWASIC00010899 attaching GSWASIC00010900.
[1295] GSWASIC00010899.
[1296] GSWASIC00010890.
[1297] GSWASIC00010890.
[1298] GSWASIC00010890.
[1299] GSWASIC00010600 attaching GSWASIC00010601.
[1300] GSWASIC00056752; GSWASIC00010534.

2017, to his knowledge, none of AutoZone, O'Reilly and Advance or any other NA Williams customer (not including GPC who had had direct contact with GetSwift and was not subject to the NAW Agreement) had agreed to trial or evaluate the GetSwift Platform or had entered into any agreement to use the GetSwift Platform.[1301]

GetSwift releases the First NAW Announcement

778 At 9am on 12 September 2017, GetSwift submitted to the ASX an announcement entitled "GetSwift Partners with NA Williams in 1bn+ Transaction Per Annum Opportunity in the Automotive Sector" (**First NAW Announcement**).[1302] Mr Banson sent an email to Mr Macdonald (copied to Mr Eagle and Mr Hunter) confirming the First NAW Announcement had been lodged with the ASX.[1303] At 9:05am, the ASX released the First NAW Announcement to the market.[1304] When the First NA Williams Announcement was submitted to the ASX, GetSwift asked the ASX to release it as "price sensitive", however, the ASX declined to do so when it released the announcement to the market.[1305]

Hunter's concern that the First NAW Announcement was not marked as price sensitive

779 At 9:10am, Mr Hunter responded to Mr Banson's 9am email asking why the First NAW Announcement had not been released as price sensitive, stating: "Why is not price sensative? [*sic*] Brett? Zane?"[1306] At 9:23am, a GetSwift advisor based in the US, Mr Amron D'Silva, sent Mr Hunter an email informing him that the First NAW Announcement was not marked as price sensitive and questioned whether it should be re-issued as "market sensitive".[1307] Mr Hunter responded that they were on the phone to the ASX to find out what was happening and stated "wtf" (apparently, colloquial for "what the f**k").[1308] At 9:39am, Mr Hunter sent an email to Mr Eagle, Mr Macdonald, Mr Banson, Mr Kiki and Ms Gordon in which he stated:

> We should issue a ASX clarification of [*sic*] this is not sorted out by open: The most recent notice whose Release Date is : 12/09/17 09:05, and the heading "GetSwift

[1301] McCollum Affidavit (GSW.0009.0035.0001_R) at [51].
[1302] First NAW Announcement (GSW.1001.0001.0864); Agreed Background Facts (GSW.0002.0002.0001) at [75].
[1303] GSWASIC00010437.
[1304] GSW.0031.0001.3496.
[1305] 4FASOC at [184]; Defences at [184].
[1306] GSWASIC00010429.
[1307] GSWASIC00010413.
[1308] GSWASIC00010413.

> Partners with NA Williams for 1B Trans for 5yrs" should have been marked price sensitive. Brett upon your advice let us know if we need to action this asap! Time is of the essence. What is the ASX saying?[1309]

780 Sometime before 9:59am, Mr Kabega received a phone call from Mr Banson. Mr Kabega stated in his affidavit, "I told [Mr Banson] that the First NAW Announcement did not disclose any material financial impact of the agreement on GetSwift. Mr Banson told me that GetSwift would lodge a revised announcement in relation to the agreement".[1310]

781 At 9:42am, Mr Banson sent an email to Mr Hunter (copied to Mr Macdonald, Mr Eagle and others) in which he informed them that he had spoken to the ASX and they would not flag the announcement as price sensitive without an additional sentence around an increase of assets, revenue or profit.[1311] Mr Banson proposed that an additional sentence be incorporated into the announcement: "The signing of the 5 year agreement is expected to significantly increase the company's revenue by $XX.XXX". Mr Banson highlighted the $XX.XXX in yellow.[1312]

782 At 9:44am, Mr Hunter sent an email to Mr Eagle and Mr Banson attaching a draft NAW Announcement and he stated "Resubmit the right line ASAP and mark it as price sensitive!"[1313]

Insertion of revenue figure in the Second NAW Announcement

783 At 9:47am, Mr Hunter responded to Mr Banson (copied to Mr Macdonald, Mr Eagle and others), stating:

> Agree use this
>
> 'The signing the 5 year agreement is expected to significantly increase the company's reoccurring revenues by more than $150,000,000 per year once fully captured.[1314]

784 At 9:48am, Mr Hunter sent an email to Mr Kiki in which he stated "being amended by the ASX as we speak – we needed to add a line about revenues – so we said more than $150,000,000 reoccurring per year (being very conservative)".[1315] Mr Kiki responded (copied to Mr Eagle,

[1309] GSWASIC00010412.
[1310] Affidavit of Andrew Kabega sworn 4 October 2019 (**Kabega Affidavit**) (GSW.0009.0010.0001_R) at [57].
[1311] GSWASIC00010408.
[1312] GSWASIC00010408.
[1313] GSW.0031.0001.3642 attaching GSW.0031.0001.3643.
[1314] GSW.0031.0002.1967.
[1315] GSWASIC00010401.

Mr Hunter and others) "ok wow".[1316] At 9:50am, Mr Hunter wrote an email to Mr Kiki (copied to Mr Eagle, Mr Macdonald and others) in which he stated, "[a]ctually make that more than $138,000,000 per year (conversion rates etc)".[1317]

785 At 9:54am, Mr Kiki sent an email to Mr Hunter (copied to Mr Eagle, Mr Macdonald, Mr Banson and Ms Gordon), in which he stated, "[a]re they going to halt the stock while they wait for that announcement".[1318] Mr Banson replied "Andrew, wont [*sic*] halt for this announcement".[1319]

786 At 9:56am, Mr Hunter responded to an email from Ben McCallum of Regal Funds Management Pty Ltd, who had sent an email congratulating Mr Hunter on the deal with NA Williams.[1320] Mr Hunter stated, "[t]hank you… Making a slight amendment to notice to make it price sensitive as per ASX". Mr McCallum replied, "I was wondering why it didn't have the $$ next to it!" to which Mr Hunter responded, "[w]e try to be conservative sometimes too much so!"[1321]

787 At 9:57am, Mr Banson sent Mr Hunter an email (copied to Mr Macdonald, Mr Eagle and Ms Gordon) attaching a draft of the second NA Williams announcement and requested they: "[p]lease review and approve".[1322] At 9:59am, Mr Banson sent Mr Kabega the updated announcement.[1323]

788 At 10am, Mr Hunter sent an email to Mr Banson (copied to Messrs Eagle, Macdonald and Ms Gordon), in which he stated "change it to "more than 138m" instead of 150 and good to go".[1324] Mr Banson responded to Mr Hunter, Mr Macdonald and Mr Eagle and Ms Gordon "Amended. Awaiting approval from Joel and Jamila?"[1325] Mr Macdonald responded at 10:03am, "yes lets [*sic*] get it out please".[1326] At 10:05am, Ms Gordon said "[a]pproved from my side."[1327]

[1316] GSWASIC00010401.
[1317] GSWASIC00010399.
[1318] GSWASIC00010364.
[1319] GSWASIC00010364.
[1320] GSWASIC00010388.
[1321] GSWASIC00010388.
[1322] GSW.0031.0002.1967 attaching GSW.0031.0002.1972.
[1323] GSW.0031.0002.5612 attaching GSW.0031.0002.5613.
[1324] GSWASIC00010367.
[1325] GSWASIC00010367 attaching GSWASIC00039320.
[1326] GSWASIC00010355.
[1327] GSWASIC00010281.

789 At 10:08am, Mr Banson sent an email to Mr Kabega stating, "[a]ttached is the final announcement for release once confirmed it's price sensitive".[1328] At 10:14am, Mr Eagle sent an email to Messrs Hunter, Macdonald and Banson and Ms Gordon stating "Confirmed and being released now. B".[1329] Mr Hunter forwarded Mr Eagle's email to Mr Kiki.[1330]

790 At 10:27am, Ms Hughan sent an email to Mr Hunter informing him that the Motley Fool was "looking for some clarification as to what the transactions can deliver for GetSwift." Mr Hunter responded, "its [*sic*] per delivery and the amended notice about to go out spells out the revenue potential very conservative - $138m per year reoccurring".[1331] He followed this email up (copied to Mr Macdonald) with Mr Hunter, stating: "make that potential of MORE than 138$ m a year".[1332] Ms Hughan responded on the first email thread:

> Ok cool – so each transaction (which is basically a POS) leads to a delivery through the GetSwift platform. Which at a discount of 20c for NA Williams gives the potential of more than $138 million a year (with an amended notice saying as such about to hit the ASX.[1333]

791 Mr Hunter responded: "more or less - yeah we dont [*sic*] want to give exact numbers for obvious reasons but we are easy well above that sum". Ms Hughan responded "OK great – I'll send that back then".[1334] Mr Hunter says the figure of $138 million was arrived at by multiplying 1.15 billion deliveries by a price of 12 cents per delivery.[1335] The price of 12 cents per delivery was in the middle of the range of prices discussed at the meeting with Mr McCollum in July 2017; that range being either 8-15 cents or 10-15 cents per delivery.[1336]

792 At 10:31am, the ASX announcement entitled 'GetSwift Partners with N.A. Williams in 1bn+ Transaction Per Annum Opportunity in the Automotive Sector' was released by the ASX and marked price sensitive (**Second NAW Announcement**).[1337]

[1328] GSW.0031.0002.5609 attaching GSW.0031.0002.5610.
[1329] GSWASIC00010281.
[1330] GSWASIC00010281.
[1331] GSWASIC00010268.
[1332] GSW.0019.0001.6902.
[1333] GSWASIC00010268.
[1334] GSWASIC00010268.
[1335] HCS at [207].
[1336] T854.24–36 (Day 12).
[1337] Second NAW Announcement (GSW.1001.0001.0866).

793 The Second NAW Announcement was in the same terms as the First NAW Announcement save that it included the following additional statement: "The signing the [*sic*] 5 year agreement is expected to significantly increase the company's reoccurring revenues by more than $138,000,000 per year once fully captured".[1338]

794 Mr McCollum explained that he had not seen the Second NAW Announcement at any time prior to it being shown to him by an ASIC officer on 14 September 2018 and that he did not know how the figure of $138,000,000 per year was arrived at, nor the circumstances surrounding the inclusion of it in that announcement.[1339]

795 As at 12 September 2017, Mr McCollum had had no further discussions with Mr White, Mr Hunter and/or Mr Macdonald or any other representative of GetSwift about the price per transaction for use of the GetSwift Platform besides the conversation on 27 July 2017. Mr McCollum did not know how much NA Williams' clients might be prepared to pay per delivery and it was only after 12 September 2017 that he learnt how much GetSwift's competitors proposed to charge NA Williams' clients.[1340]

The Third NAW Announcement

796 On 23 October 2017, Mr Hunter sent an email to Mr Ozovek (copied to Mr Macdonald and Mr Lawrence), in which he requested that a new chart and the cash balance be inserted into the draft of the Appendix 4C for October 2017,[1341] which following some interactions, Mr Ozovek did.[1342] On 24 October 2017, Mr Hunter made further changes to the Appendix 4C and sent them to Mr Macdonald, Mr Eagle, Mr Ozovek and Mr Lawrence.[1343] The draft Appendix 4C contained the following sentence:

> Under the exclusive 5 year contract with N.A. Williams the will [*sic*] focus in making available and expanding the GetSwift platform across a new automotive vertical, with an estimated more than 1.15 Billion transactions per year once fully implemented and with an estimated $138,000,000 reoccurring revenue. It is expected to be fully realized

[1338] Second NAW Announcement (GSW.1001.0001.0866).
[1339] McCollum Affidavit (GSW.0009.0035.0001_R) at [49].
[1340] McCollum Affidavit (GSW.0009.0035.0001_R) at [53].
[1341] GSWASIC00006467 attaching GSWASIC00006468.
[1342] GSWASIC00006455 attaching GSWASIC00006456; GSWASIC00006449 attaching GSWASIC00006451.
[1343] GSWASIC00006243 attaching GSWASIC00006256.

in 2019.[1344]

797 On 24 October 2017, Mr Lawrence sent Mr Hunter, Mr Macdonald, Mr Eagle and Mr Ozovek the "latest and clean redline version" of the Appendix 4C.[1345] On the same day, Mr Eagle provided his comments on the draft Appendix 4C,[1346] which Mr Macdonald confirmed he had incorporated.[1347]

798 On 29 October 2017, Mr Hunter circulated to Mr Ozovek, Mr Eagle, Mr Macdonald and Mr Lawrence further changes to the Appendix 4C,[1348] and later that day Mr Ozovek sent the final draft of the Appendix 4C to Mr Eagle, Mr Hunter and Mr Macdonald with the subject line: "4C – Final Review Before Lodging".[1349]

799 On 31 October 2017, the ASX released an announcement entitled 'Quarterly Update and Appendix 4C" (**Third NAW Announcement**).[1350] In the Third NAW Announcement, GetSwift stated that: additional global client onboarding was underway to utilise GetSwift's software as a service solution to optimise delivery logistics; a notable client signed for the September quarter was NA Williams with a new vertical segment (North American Automotive Industry) poised to deliver more than 1 billion transaction per year when fully implemented; and under the exclusive five year contract with NA Williams, the GetSwift Platform will expand into a new automotive vertical, with an estimated more than 1.15 billion transactions per year once fully implemented and an estimated $138,000,000 USD recurring revenue per year.[1351]

800 On 31 October 2017, Mr Banson sent an email to Mr Hunter, Mr Macdonald, Mr Ozovek and Mr Eagle informing them that the quarterly report and Appendix 4C was released to the ASX before market opened.[1352]

[1344] GSWASIC00006256.
[1345] GSWASIC00006213; GSWASIC00055149 attaching GSWASIC00055154.
[1346] GSWASIC00067274 attaching GSWASIC00067278.
[1347] GSWASIC00055174.
[1348] GSWASIC00005650 attaching GSWASIC00005651.
[1349] GSWASIC00005655 attaching GSWASIC00005656, and GSWASIC00005661.
[1350] October 2017 Appendix 4C and Third NAW Announcement (GSW.1001.0001.0277).
[1351] October 2017 Appendix 4C and Third NAW Announcement (GSW.1001.0001.0277).
[1352] GSW.0031.0002.3221.

Subsequent events

801 By 14 May 2019, no NA Williams customer had entered into any agreement with GetSwift. Moreover, NA Williams had not received any fees or commissions pursuant to the NAW Agreement.[1353]

G.1.12 *Johnny Rockets*

802 Johnny Rockets Kuwait (**Johnny Rockets**) is an international restaurant chain in Kuwait.[1354]

Preparation of the Johnny Rockets Agreement

803 The agreement between Johnny Rockets and GetSwift, and the amendments to it, were negotiated by Mr Macdonald for GetSwift, and Mr Ramzy Chehab and Mr Maher Megaly for Johnny Rockets, predominantly by emails. These communications were copied to Mr Hunter.

804 On 17 May 2017, Mr Chehab sent an email to the email address 'info@getswift.co' enquiring about GetSwift's "drivers [*sic*] delivery app/software" and requesting a "detailed presentation with features" from GetSwift.[1355] In this email, Mr Chehab indicated that Johnny Rockets represented "an international restaurant chain in Kuwait" which made an "average of 800-900 delivery orders a day".[1356]

805 On 25 July 2017, Mr Macdonald sent an email to Mr Chehab and Mr Megaly (copied to Mr Hunter), stating:

> We want to make this as easy and as successful as possible for both of you gentlemen so if you could kindly come back to us on the below, we will then build out a plan and commercial arrangement for you to pilot GetSwift.
>
> Once you are happy and the successful pilot is experienced we will then be delighted to execute a ramp up for your whole organization:
>
> 1. Please send us monthly delivery numbers for Johnny Rockets and number of stores. We would then structure a multi-store pilot plan for you to approve.
>
> 2. Please send us a list of other chains in your organization and total monthly delivery numbers and stores for these groups so we can price it effectively for you. If you can give us an idea which order or priority you would like the deployments to take

[1353] McCollum Affidavit (GSW.0009.0035.0001_R) at [60].
[1354] GSWASIC00019553.
[1355] GSWASIC00019553.
[1356] GSWASIC00019553.

place, we can then also structure a plan for you to approve.

3. Do you have a diagram or description of how you would like GetSwift to connect to all of your platforms so we can build out an integration plan for you? We can then assign the appropriate staff on our part to make this happen for you.

Once all this is in place we will send you a simple one page term sheet you can sign and we would then assign a project manager and team to work with you on this initiative.[1357]

806 On 30 July 2017, Mr Macdonald sent a further email to Mr Chehab and Mr Megaly (copied to Mr Hunter) regarding the proposed pilot, in which he attached a presentation and link to training videos.[1358] Mr Macdonald also stated:

> In order for us to proceed to the next steps around planning a pilot together, we would like to send you a proposal. This proposal will cover off items such as:
>
> - Pilot for 10 stores
> - Post-pilot rollout (Johnny Rockets, then other food chains)
>
> …
>
> To price this for you, we will need to know what the monthly delivery volume for Johnny Rockets is?
>
> Also if you could send me what the monthly delivery volume is for each other food chain in your group. That way once the GetSwift pilot is successful we can price your proposal to cover the whole group which will give Johnny Rockets a group buying discount.[1359]

807 On 31 July 2017, Mr Chehab replied to Mr Macdonald (copied to Mr Hunter) in the following terms:

> As far it's related to Johnny Rockets we usually have a monthly average of 20-25k transaction, we only have 10 branches and 7 participating in delivery. The pilot can be tested in three or four units and we will only require 2 weeks to figure out the outcome.[1360]

808 On 7 August 2017, Mr Hunter and Mr Macdonald exchanged emails regarding the draft proposal for Johnny Rockets to undertake an "initial free pilot" of the GetSwift Platform.[1361]

[1357] GSWASIC00015052.
[1358] GSWASIC00014548.
[1359] GSWASIC00014548.
[1360] GSWASIC00057461.
[1361] GSWASIC00014304.

That evening, Mr Macdonald sent an email to Mr Chehab and Mr Megaly (copied to Mr Hunter) attaching a document entitled "Term Sheet".[1362] In this email, Mr Macdonald stated:

> Thank you for the opportunity to partner together and enter into an initial free trial period.
>
> In order for us to guarantee you best pricing and other benefits I am attaching a 1 page term sheet for us to get in place before we commence integration and trial period.
>
> Could you please review and sign the attached term sheet so we can then get our team together to plan integration and next steps?[1363]

809 In so far as this draft term sheet concerned, the parties to the term sheet were Johnny Rockets Kuwait and GetSwift. Clause 4 of the draft term sheet provided that the term of the agreement was 37 months, comprised of a one-month trial period plus an "initial term" of 36 months. Clause 4 went on to state that there was a "Limited Roll Out Period" of "1 month free", which was "to run on or about August 15th, 2017 to the beginning of October 2017". Clause 4 further provided that the initial term would "start no later than 1st October 2017 and run through to 1st of October 2020". If Johnny Rockets did not wish to continue the agreement, it was required to provide written notice to GetSwift at least seven days prior to the expiration of the Limited Roll Out Period. If no such notice was provided, the initial term would "automatically commence on October 1st 2017".[1364]

810 On 11 August 2017, Mr Macdonald sent a further email to Mr Chehab and Mr Megaly (copied to Mr Hunter) regarding the draft "Term Sheet". In this email, Mr Macdonald stated:

> If you would be so kind as to return the signed term sheet to us, we will assign the team that will start planning the 4 week free pilot roll-out with you and your team. As this progresses we will be in a good position to understand and provide all the requirements for a successful full enterprise roll-out should you chose to proceed.[1365]

811 On 16 October 2017, Mr Macdonald sent an email to Mr Chehab and Mr Megaly (coped to Mr Hunter) attaching an updated draft term sheet.[1366] The email was also sent to Mr Stephan Roman, who appears to have worked for an organisation named "Kharafi Global". There is no

[1362] GSWASIC00057349 attaching GSWASIC00057350.
[1363] GSWASIC00057349.
[1364] GSWASIC00057350.
[1365] GSWASIC00014092.
[1366] GSWASIC00006867 attaching GSWASIC00006868.

evidence regarding Mr Roman's role at Kharafi Global or the nature of that entity's relationship with Johnny Rockets. In this email, Mr Macdonald stated:

> Nice to reconnect with you today.
>
> As discussed please find attached updated term sheet
>
> We look to signing this with you this week and kicking off next steps.[1367]

812 The revised term sheet was identical to the original term sheet in all material respects other than the dates for the "Limited Roll Out Period" and the initial term.[1368] The "Limited Roll Out Period" was now stated to "run on or about November 1st, 2017 to the beginning of December 2017". The initial term was to "start no later than 1st December 2017 and run through to 1st of December 2020".

813 Between 19 and 21 October 2017, Mr Macdonald and Mr Roman exchanged emails, copying others including Mr Hunter, regarding the signing of the term sheet.[1369]

Entry into the Johnny Rockets Agreement

814 On or around 21 October 2017, Mr Roman, on behalf of Johnny Rockets in his stated capacity as "Ops Consultant",[1370] signed an agreement entitled "Term Sheet" with GetSwift (**Johnny Rockets Agreement**).[1371] The Johnny Rockets Agreement contained hand-written amendments to clause 4, which were to the following effect:

(1) the initial trial period (referred to as a "Limited Roll out Period"), which was to "run on or about November 1st, 2017 to beginning of December 2017" was to involve "2 stores"; and

(2) following the "Limited Roll out Period", the "Initial Term" of 36 months would start no later than 1 December 2017 or "possibly January 1st [2018] due to budget projection" unless Johnny Rockets gave notice, at least 7 days prior to the expiration of the "Limited roll out period" that it did not wish to continue with the agreement.[1372]

[1367] GSWASIC00006867.
[1368] GSWASIC00006868.
[1369] GSWASIC00055489; Johnny Rockets Agreement (GSWASIC00006520).
[1370] GSWASIC00028549.
[1371] GSWASIC00055489 attaching Johnny Rockets Agreement (GSWASIC00006520).
[1372] Johnny Rockets Agreement (GSWASIC00006520).

815 On 21 October 2017, Mr Roman sent an email to Mr Macdonald (copied to Mr Hunter), attaching the Johnny Rockets Agreement.[1373]

Preparation and release of the Johnny Rockets Announcement

816 On 9 August 2017, at 8:17pm, Mr Hunter sent an email to Mr Macdonald attaching a draft announcement concerning GetSwift's entry into an agreement with Johnny Rockets.[1374] This draft announcement stated, among other things:

> GetSwift Limited (ASX: GSW) ('GetSwift' or the 'Company'), the SaaS solution company that optimises delivery logistics world-wide, is pleased to announce that it has signed an exclusive multi-year agreement with Johnny Rockets International.[1375]

817 At 8:20pm, Mr Hunter sent a further email to Mr Macdonald attaching a revised draft announcement concerning GetSwift's entry into an agreement with Johnny Rockets. Mr Hunter indicated that he made a "slight change looking at their map".[1376]

818 On 22 October 2017, Mr Hunter sent an email to Mr Macdonald and Mr Eagle attaching two draft ASX announcements.[1377] One of the announcements concerned GetSwift's entry into the Johnny Rockets Agreement (the other was an ASX release that GetSwift had reached its second performance milestone). In this email, Mr Hunter stated: "Please review - the 375k will go out tonight, the JR on Tues before market open."[1378]

819 Mr Eagle replied to Mr Hunter's email with an amended Johnny Rockets announcement.[1379] In his covering email, Mr Eagle wrote "Some minor changes. Number of cities, verticals etc changed to match what we released end of last week. Otherwise all good my end".[1380]

820 On 23 October 2017, Mr Macdonald sent an email to Mr Roman (copied to Mr Hunter), informing him that GetSwift would be submitting an announcement to the ASX concerning the Johnny Rockets Agreement. In this email, Mr Macdonald stated:

[1373] GSWASIC00055489 attaching Johnny Rockets Agreement (GSWASIC00006520).
[1374] GSWASIC00057282 attaching GSWASIC00040609.
[1375] GSWASIC00040609.
[1376] GSWASIC00057281 attaching GSWASIC00040607.
[1377] GSWASIC00055453 attaching GSWASIC00037982, and GSWASIC00037983.
[1378] GSWASIC00055453.
[1379] SWI00029655 attaching GSWASIC00037979, and GSWASIC00037980.
[1380] SWI00029655.

> As part of being a public company and GetSwift's continuous disclosure requirements with the ASX (Australian Stock [*sic*] Exchange), we have to notify them of any client agreements that we sign. Nothing needed on your end here and this is more of a courtesy note to give you the heads up that we will have to notify ASX this week.
>
> Please let me know if you need anything in the interim and we look fwd [*sic*] to ramping up with you guys shortly![1381]

821 On 25 October 2017, at 9:21am, Mr Macdonald sent an email to Mr Polites of M+C Partners (copied to Mr Hunter), attaching a copy of the announcement to be made to the ASX by GetSwift concerning the Johnny Rockets Agreement.[1382] Mr Macdonald indicated that this was being provided to Mr Polites on the basis that it was "commercial in confidence".[1383]

822 At 10:16am, Mr Macdonald sent an email to Mr Banson, Mr Hunter, Mr Eagle and Mr Lawrence, instructing him to submit the announcement concerning GetSwift's entry into an agreement with Johnny Rockets to the ASX. In this email, Mr Macdonald stated:

> Can you please release this to ASX ASAP
>
> Marked as price sensitive following normal procedure of calling MAO [ASX Market Announcements Office] to confirm price sensitivity.[1384]

823 Thereafter, there was correspondence between Mr Macdonald and Mr Peter Vaughan of The CFO Solution (was who standing in for Mr Banson). Mr Macdonald expressed the view that the announcement was price sensitive given they stated that "the delivery count will be in the millions".[1385] Mr Vaughan's view was that, absent a statement as to a material effect on revenue or assets, the ASX would not mark the announcement as price sensitive. Mr Hunter asked Mr Eagle to "handle it"; following which there were communications between Mr Eagle, Mr Vaughan and the ASX.[1386] Mr Vaughan sent an internal email, advising that he had spoken to the ASX and that the GetSwift announcement was in que for review". Mr Eagle sent an email to the ASX (copied to Mr Macdonald and Mr Hunter) expressing his displeasure and frustration at having problems sending out the announcement. Mr Eagle also noted that "we are being

[1381] GSWASIC00006472.
[1382] GSWASIC00006194 attaching GSWASIC00006195.
[1383] GSWASIC00006194.
[1384] GSWASIC00006182 attaching GSWASIC00006183.
[1385] GSWASIC00006178.
[1386] GSWASIC00006127.

treated very, very differently to other companies" and that "this is having a material impact on our shareholder/investor/potential investor relations".[1387]

824 At 10:40am, Mr Banson sent an email to Mr Macdonald, on which Mr Hunter, Mr Lawrence, Mr Eagle and Ms Gordon were copied, in which Mr Banson stated that the announcement concerning GetSwift's entry into an agreement with Johnny Rockets had been submitted to the ASX.[1388] At 11:48am the ASX released an announcement concerning GetSwift's entry into the Johnny Rockets Agreement (**Johnny Rockets Announcement**), which was marked as "price sensitive".[1389] The Johnny Rockets Announcement, relevantly stated that:

(1) GetSwift had signed an exclusive multi-year agreement with Johnny Rockets; and

(2) GetSwift's indicative estimates were for a transaction yield in excess of millions of deliveries per year upon complete adoption and utilisation (**Johnny Rockets Projection**).

825 At 11:50am, Mr Vaughan sent an email to Mr Eagle, Mr Hunter, Mr Macdonald, Mr Lawrence, Mr Banson and Ms Gordon, in which he confirmed that the Johnny Rockets Announcement had been released by the ASX and "marked price sensitive".[1390] Mr Eagle replied to Mr Vaughan's email, requesting a summary of the 'interactions and communications [Mr Vaughan] had this morning with ASX", which Mr Eagle said he wanted to "forward" to "Andrew Black and his boss."[1391]

Subsequent communications

826 On 7 December 2017, Mr Brian Aiken, GetSwift's Executive Program Officer, sent an email to representatives of Johnny Rockets (copied to Mr Macdonald, Mr Hunter and Mr Ozovek), regarding the status of the "GetSwift Johnny Rockets Project". In this email, Mr Aiken stated that "GetSwift is ready to begin development and testing of OCIMS Integration, but is awaiting an interface licensing agreement between Kharafi Global and OCIMS" and that GetSwift was

[1387] GSWASIC00006127.
[1388] GSWASIC00006180.
[1389] Johnny Rockets Announcement (GSW.1001.0001.0250); Agreed Background Facts (GSW.0002.0002.0001) at [83].
[1390] GSWASIC00006093.
[1391] GSWASIC00006093.

developing "training material to be ready prior to the Trial Period". Notably, Mr Aiken also stated: "further integration efforts are contingent upon an interface licensing agreement between Kharafi Global and OCIMS."[1392]

827 On 9 December 2017, Mr Roman asked his colleague, Mr Vishalg at Kharafi Global, whether they could "go with one license for the test".[1393]

828 On 13 December 2017, Mr Aiken sought an update from Mr Vishalg,[1394] to which Mr Vishalg replied stating that he was "still waiting for the cost approval from management".[1395]

Deferral of limited roll out

829 On 14 December 2017, Mr Roman sent an email to Mr Aiken, in which he stated "I would like to ask if you could postpone this trial until mid-January. Would that be possible?"[1396] Mr Aiken replied: "Yes, we can move the trial period. I'd like to meet with your team over Skype in early January to discuss the path/schedule moving forward".[1397] That afternoon, Mr Roman replied: "Thanks, I will contact you after first of the year".[1398]

830 On 15 December 2017, at 8:46pm, Mr Ozovek sent an email to Mr Hunter (copied to Mr Macdonald), forwarding the email from Mr Roman requesting that the commencement of Johnny Rockets' trial of the GetSwift Platform be postponed. In this email, Mr Ozovek stated: "FYI, due to budget issues from Johnny Rockets, requesting to push trial off to January."[1399] At 10:50pm, Mr Hunter responded to this email stating "Jan I guess it is".[1400] At 11:12pm, Mr Aiken sent an email to Mr Hunter, Mr Macdonald and Mr Ozovek, providing them with an "EPO report for the week of 15 Dec 2017". This email included a paragraph relating to "Johnny Rockets", in which Mr Aiken stated:

> Due to OCIMS Interface Licensing Costs, Mr. Stephan Roman has requested (and we have agreed) to move the start of the Trial Period to the middle of January. Integration

[1392] GSWASIC00003499 at 3503.
[1393] GSWASIC00003499 at 3502.
[1394] GSWASIC00003499 at 3502.
[1395] GSWASIC00003499 at 3500.
[1396] GSWASIC00003709 at 3710.
[1397] GSWASIC00003499 at 3500.
[1398] GSWASIC00003499 at 3500.
[1399] GSWASIC00003716.
[1400] GSWASIC00003709.

> development can not begin until the interface license is in place. Our operations team continues to develop training material to be ready in time for the trial period.[1401]

Mr Roman's email

831 On 8 January 2018, Mr Aiken wrote to Mr Roman enquiring whether there was any update on the "status of the OCIMS Interfacing License",[1402] to which Mr Roman replied the following day:

> Unfortunately, we will not be able to move forward because of the costs associated with the interface. I sincerely apologize for the inconvenience and wasting of your time.[1403]

832 On the afternoon of 9 January 2018, Mr Ozovek sent an email to Mr Hunter and Mr Macdonald, forwarding the email from Mr Roman to Mr Aiken informing him that Johnny Rockets would not be "able to move forward" with GetSwift. In this email, Mr Ozovek noted:

> Johnny Rockets trying to back out on the deal due to integration costs on their end. I have Brian going back to inquire about the cost of the interface. May be a Bareburger type deal where we need an additional minimum commitment to pay the amount, but I'll get the data and give you options.[1404]

G.1.13 *Yum Restaurant Services Group, LLC*

833 Yum! Brands, Inc. (**Yum**) is a Fortune 500 restaurant company founded in 1997 that owns the brands Kentucky Fried Chicken (**KFC**), Pizza Hut and Taco Bell brands.[1405] Yum's headquarters are in Louisville, Kentucky, in the United States of America and it has restaurants in about 130 countries.[1406] Pizza Hut International is a wholly-owned subsidiary of Yum, which is the owner of the Pizza Hut brand.[1407] Within Pizza Hut International, there are four business units that are responsible for liaising with Pizza Hut International's franchisees located in markets around the world, excluding franchisees based in the United States and China (but including Taiwan and Hong Kong).[1408]

[1401] GSWASIC00033848.
[1402] GSWASIC00003499 at 3500.
[1403] GSWASIC00003499.
[1404] GSWASIC00003499.
[1405] T689.31–36 (Day 10).
[1406] Affidavit of Devesh Sinha affirmed 17 May 2019 (**Sinha Affidavit**) (GSW.0009.0017.0001) at [8].
[1407] T689.31–47 (Day 10); Sinha Affidavit (GSW.0009.0017.0001) at [12].
[1408] T689.40–47 (Day 10); T694.13–32 (Day 10).

Initial contact between GetSwift and Yum

834 On 28 April 2017, Mr Nobel Kuppusamy of Pizza Hut International sent an email to the email address "info@getswift.co" stating that he wished to understand the capabilities of the GetSwift Platform and to see if it could help address Pizza Hut International's "specific use cases". [1409] Ms Cox sent an email to Mr Hunter and Mr Macdonald forwarding Mr Kuppusamy's email.[1410]

835 On 2 May 2017, Mr Kuppusamy sent an email to Mr Hunter and Mr Macdonald confirming that a mutual nondisclosure agreement would be required prior to any meeting between Pizza Hut International and GetSwift.[1411] On 4 May 2017, Mr Macdonald sent Mr Eagle and Mr Hunter a confidentiality agreement from Yum. Mr Macdonald's instruction to Mr Eagle is redacted and subject to a claim for legal professional privilege by GetSwift and the attachment is not in evidence.[1412] On 5 May 2017, Mr Macdonald sent Mr Kuppusamy and Ms Traci Adams, legal counsel at Yum (copied to Mr Hunter and Ms Cox) an executed copy of the nondisclosure agreement between GetSwift and Yum.[1413]

836 In late May 2017 or early June 2017, Mr Macdonald engaged in discussions with Mr Kuppusamy and Mr Rohit Kapoor, Vice President of IT at Pizza Hut International.[1414]

837 On 9 June 2017, Mr Macdonald sent an email to Mr Kuppusamy and Mr Kapoor in which he suggested that GetSwift undertake a pilot in 15 to 20 stores to gather sufficient data. Attached to this email was an implementation plan prepared by GetSwift for the suggested pilot.[1415]

838 On 19 July 2017, Mr Macdonald attended a meeting with Mr Kapoor and other personnel from Yum.[1416] The following day, Mr Macdonald sent an email to Mr Kapoor (copied to Mr Hunter) and other personnel from Yum, thanking everyone for their time the previous day, requesting

[1409] GSWASIC00021304 at 1305–1306.
[1410] GSWASIC00021304 at 1305.
[1411] GSWASIC00020713 at 0717.
[1412] GSWASIC00031925_R.
[1413] GSWASIC00020713 attaching GSWASIC00062581.
[1414] GSWASIC00057905.
[1415] GSWASIC00057905 attaching GSWASIC00063943.
[1416] GSWASIC00015493.

the geographic requirements, scale and timeline and stating that GetSwift would be "delighted to sign a master services agreement."[1417]

839 On 30 and 31 July 2017, Mr Kapoor and Mr Macdonald exchanged emails regarding, among other things, Pizza Hut's "top 20 markets".[1418]

Negotiations between Pizza Hut International and GetSwift in relation to a Pilot

840 In around mid-August 2017, Mr Devesh Sinha, who, at the time, was the Director for Franchise and Restaurant Capability for Pizza Hut International, was assigned to assist with conducting the pilot with GetSwift – which was also referred to as a "proof of concept" – and to assess GetSwift for the fleet management project to validate the solution as a potential option for Pizza Hut International.[1419] If successful, the intention was to appoint GetSwift as the preferred supplier of delivery tracking software for Yum franchisees in its top 20 markets globally.[1420] At this time, there were about 3,000 to 5,000 restaurants in Pizza Hut International's top 20 markets.[1421] Pizza Hut International had a presence in 109 countries globally,[1422] including about 9,000 to 10,000 stores,[1423] and Yum operated about 42,000 restaurants in 130 countries globally.[1424]

841 Mr Sinha was "primarily responsible for training, function and building capability" for Pizza Hut's franchise operations around the world, and was the lead on the project with GetSwift.[1425] By the time Mr Sinha became involved, GetSwift had been selected from a shortlist of three potential providers to conduct a trial with Pizza Hut International.[1426]

842 Mr Sinha explained that the delivery services were sought from GetSwift for Pizza Hut International only, and GetSwift's services were not sought for all 109 countries in which Pizza Hut franchises operated. Indeed, Mr Sinha told Mr Hunter and Mr Macdonald that his objective

[1417] GSWASIC00015493.
[1418] GSWASIC00014495.
[1419] Sinha Affidavit (GSW.0009.0017.0001) at [18], and [35].
[1420] T691.29–32 (Day 10).
[1421] T692.29 (Day 10).
[1422] T692.32 (Day 10).
[1423] T693.21 (Day 10).
[1424] T704.39–45 (Day 10).
[1425] T686.13–23 (Day 10).
[1426] T691.10–27 (Day 10).

was to conduct pilots in two test markets in order to assess whether the GetSwift product was suitable for further roll-out, and that if the pilot tests were successfully completed, then the GetSwift product could be potentially deployed to Pizza Hut International's top 20 markets; that is, GetSwift's services were only sought in respect of up to 20 countries pending the successful completion of testing.[1427] The other Yum companies such as KFC and Taco Bell were not within the scope of the fleet management services sought from GetSwift, and the discussions between Mr Sinha and personnel from GetSwift only related to Pizza Hut International and not Pizza Hut US or Pizza Hut China.[1428] Mr Sinha did not conduct any negotiations with anyone from GetSwift about GetSwift's services for any of the other companies of Yum.[1429]

843 In negotiations with Mr Hunter and Mr Macdonald, Mr Sinha discussed that Pizza Hut International would require a pilot of at least three months, but would prefer that the pilot continue for up to 180 days, and that no fees were to be charged by GetSwift during the pilot phase.[1430] Mr Hunter and Mr Macdonald proposed charging 28 cents or 29 cents per delivery, but Mr Sinha told them that was too expensive and would not be competitive.[1431] He instead requested a pricing structure in the range of 6.5 cents to 7.5 cents per delivery, and for this to be a sliding scale price range based on the number of deliveries.[1432] These estimates were provided as a starting point.[1433]

Initial Proposal by GetSwift

844 On 24 August 2017, Mr Macdonald sent an email to Mr Sinha, Mr Kapoor and Mr Juergen Schrodel of Yum (copied to Mr Hunter) in which he provided a preliminary proposal overview. Mr Macdonald also attached a presentation, Pizza Hut International's high level requirements, and the proposal (**Initial Proposal**).[1434] On the same date, Mr Hunter responded to an email from Mr Sinha in which he thanked Mr Hunter for sending through the Initial Proposal. Mr

[1427] T689.1–20 (Day 10); Sinha Affidavit (GSW.0009.0017.0001) at [19], and [24].
[1428] Sinha Affidavit (GSW.0009.0017.0001) at [20].
[1429] Sinha Affidavit (GSW.0009.0017.0001) at [20].
[1430] Sinha Affidavit (GSW.0009.0017.0001) at [21], and [28].
[1431] Sinha Affidavit (GSW.0009.0017.0001) at [29].
[1432] Sinha Affidavit (GSW.0009.0017.0001) at [29].
[1433] Sinha Affidavit (GSW.0009.0017.0001) at [29].
[1434] GSWASIC00012483 attaching GSWASIC00012484, GSWASIC00012530, and GSWASIC00012529.

Hunter stated "please keep in mind that this is a preliminary proposal. I am sure we would be able to together [*sic*] tweak it."[1435] The Initial Proposal sent by Mr Macdonald was a result of discussions between Mr Sinha, Mr Hunter and Mr Macdonald.[1436] It referred to GetSwift providing services to the "Top 20 Markets"; however, at this stage, Mr Sinha had not given anyone at GetSwift any information about these 20 markets, other than the name of the 20 markets.[1437] Mr Sinha did not communicate with Pizza Hut International's franchise partners about the services to be tested and potentially provided by GetSwift.[1438]

845 At around this time, Mr Sinha also appears to have provided Mr Macdonald and Mr Hunter information about the point of sale systems and delivery vehicles used by Pizza Hut International's franchisees in the top 20 markets.[1439] Mr Sinha estimated, based on his experience, that Pizza Hut International's stores in the top 20 markets carried out approximately 800 to 1,000 transactions per store per week.[1440] Mr Sinha further estimated that approximately 25 per cent of each store's transactions were deliveries, which translated to roughly 30 to 35 deliveries per store per day.[1441] Mr Sinha agreed in cross-examination that he provided the estimates to GetSwift so that GetSwift could understand the potential scale of the commercial opportunity and tailor its pricing accordingly.[1442]

846 The parties to the Initial Proposal were Yum (which was defined as the "Client") and GetSwift. Clause 3 of the Initial Proposal, which was titled "Services", provided, relevantly, that Yum "exclusively" engaged GetSwift to provide the "Services", which included the "[u]se of GetSwift's proprietary software platform to provide [Yum] with logistics management, tracking, dispatch, route and reporting of delivery operations". Clause 3 further provided that GetSwift was to provide the Services "within the Top 20 regions as nominated by [Yum] in schedule 1". Schedule 1 was titled "Nominated Markets", which set out Pizza Hut International's top 20 markets.[1443] These were the markets that Mr Sinha had discussed with

[1435] GSWASIC00008862 at 8867.
[1436] Sinha Affidavit (GSW.0009.0017.0001) at [23].
[1437] Sinha Affidavit (GSW.0009.0017.0001) at [24].
[1438] Sinha Affidavit (GSW.0009.0017.0001) at [24].
[1439] T692.7–15 (Day 10).
[1440] T694.38–40 (Day 10).
[1441] T695.1–5 (Day 10); T695.36–37 (Day 10).
[1442] T695.16–22 (Day 10).
[1443] GSWASIC00012530 at 2531.

Mr Macdonald and Mr Hunter in late August 2017.[1444] In Schedule 2 to the Initial Proposal, under the heading "Implementation Plan", the following text appeared:

> GetSwift will work with the client to plan, execute and deliver an appropriate global rollout and timely implementation of the GetSwift platform. GetSwift will embed a global program director at the client's location to facilitate the work between the GetSwift teams and the client. This will be provided at no additional cost.[1445]

847 There also followed a table titled "Proposed Staffing", which set out the proposed numbers of "National Account Managers", "Regional Project Managers", "Engineers" and "Support Staff" to be deployed across each of the USA/North America, UK/EU, Asia, Australia/New Zealand and Middle East regions.[1446]

848 Following Mr Macdonald's email, Mr Hunter and Mr Kapoor exchanged emails regarding GetSwift's proposed pricing, during which Mr Kapoor asked what the pricing would be "for the first million transactions".[1447] Mr Hunter replied that "[w]e would extend you the same price as for the first tier 7.5c, no worries".[1448] The Initial Proposal was not accepted by Pizza Hut International and was never signed on behalf of Pizza Hut International.[1449] Instead, Pizza Hut International sought a more competitive pricing structure than that included in the Initial Proposal.[1450]

849 During August and September 2017, Mr Sinha conducted negotiations with Mr Hunter and Mr Macdonald in which they considered the possible volumes of the transactions, cost and deliveries for each country in which GetSwift's services might be made available if the pilot tests were successfully completed.[1451] However, Pizza Hut International did not have the data for each franchise in each of these countries as the data lay with the respective franchisees, which he told Mr Hunter and Mr Macdonald.[1452] As a result, Mr Sinha made assumptions, which he shared with Mr Hunter and Mr Macdonald. Mr Sinha told Mr Hunter and Mr

[1444] T691.41–692.5 (Day 10).
[1445] GSWASIC00012530 at 2533.
[1446] GSWASIC00012530 at 2533.
[1447] GSWASIC00012473.
[1448] GSWASIC00012473.
[1449] Sinha Affidavit (GSW.0009.0017.0001) at [30].
[1450] Sinha Affidavit (GSW.0009.0017.0001) at [29].
[1451] Sinha Affidavit (GSW.0009.0017.0001) at [25].
[1452] Sinha Affidavit (GSW.0009.0017.0001) at [25].

Macdonald that he estimated that there were approximately 800 to 1,000 transactions per store per week in the top 20 markets and about 25% of those transactions would be deliveries (which equates to approximately 200 to 250 deliveries per store per week).[1453] Mr Sinha made those estimates based on his experience.[1454] In cross-examination, Mr Sinha estimated that the top 20 markets had 3,000 to 5,000 stores.[1455] It follows that the approximate number of total deliveries per year for all stores in the top 20 markets for Pizza Hut International at this time was approximately 31,200,000 (800 × 0.25 × 3,000 × 52) to 65,000,000 (1,000 × 0.25 × 5,000 × 52).

850 On 7 September 2017, Mr Hunter, Mr Macdonald and Mr Sinha participated in a telephone discussion in which Mr Sinha told Mr Hunter and Mr Macdonald that: (1) Pizza Hut International was keen to conduct the proof of concept in two markets other than Australia; (2) Pizza Hut International would identify the two relevant markets for the proof of concept in the coming weeks; (3) GetSwift would be one of the vendors with whom Pizza Hut International was progressing to a proof of concept; (4) Pizza Hut International would accept the pricing proposal in the Initial Proposal for the proof of concept and would work out the long-term pricing to ensure that it was attractive to the Pizza Hut International business model; and (5) Pizza Hut International would need to negotiate additional tiers of pricing.[1456] Mr Sinha summarised this discussion in an email that he sent to Mr Hunter and Mr Macdonald on the same date.[1457]

851 During Mr Sinha's discussions with Mr Macdonald and Mr Hunter, he told them that as a large organisation, Pizza Hut International was also testing other service providers in various markets which offered similar services to GetSwift.[1458]

852 On 12 September 2017, Mr Sinha sent an email to Mr Hunter in which he said:

> The 2 markets we are likely to test are HK and India, any thoughts or concerns? I am in the process of organizing a call with India first and HK in about 2 weeks to introduce and start discussions. Getswift should share the solution with the local team son [*sic*]

[1453] Sinha Affidavit (GSW.0009.0017.0001) at [25].
[1454] T694.37–43 (Day 10); Sinha Affidavit (GSW.0009.0017.0001) at [25].
[1455] T692.26–34 (Day 10).
[1456] GSWASIC00008862 at 8866–8867; Sinha Affidavit (GSW.0009.0017.0001) at [33].
[1457] GSWASIC00056487.
[1458] Sinha Affidavit (GSW.0009.0017.0001) at [36].

this call. Please expect an invite from me.[1459]

853 On 16 September 2017, Mr Hunter sent an email to Mr Sinha (copied to Mr Macdonald) attaching an executive brief and high level implementation guide.[1460] Mr Hunter stated:

> Once we are all in sync the only remaining bit of the process is just some paperwork to detail the pilot terms and conditions as well as structure a post pilot approach and commercial proposition.[1461]

854 The first page of the attachment described the "Purpose and Goals of Program" as "[t]o successfully execute a multi-regional deployment and implementation with dedicated resources as a proof of concept to demonstrate optimization of the throughput and underlying delivery logistical processes of Yum Brands/Pizza Hut in the targeted countries and regions".[1462] Under the heading "Scope", the executive brief stated, "Pizza Hut delivery stores will be running GetSwift SaaS for a pilot period within the specified geographies. Upon successful pilot, program plans for additional global regions rollout as requested by Yum will be supplied for review and implementation approval".[1463]

855 On 27 September 2017, Mr Hunter sent a further email to Messrs Sinha, Rohit, Juergen (copied to Mr Macdonald and Mr Ozovek), in which he stated, "[j]ust a quick ping to see how we are tracking…".[1464] On the same date, Mr Sinha responded, stating:

> Hi Bane. Thank you for your note. Not what you want to hear, but I have appreciated your enthusiasm and want to be candid with you. We have been working with markets to get this initiated but they are already engaged in discussions with similar solution providers, so working through those and conflicting priorities. At this stage, nothing more is needed from you, I would need to get back to you as we figure out the way forward. Thanks for your patience[1465]

856 By 27 September 2017, negotiations with the Hong Kong franchise about a trial of the GetSwift platform were ongoing.[1466] On the same date, Mr Kapoor, who was party to the email chain between Mr Hunter and Mr Sinha, sent an email to Mr Hunter stating: "As we are doing our

[1459] GSWASIC00008862 at 8865.
[1460] GSWASIC00056284 attaching GSWASIC00009939.
[1461] GSWASIC00056284.
[1462] GSWASIC00009939.
[1463] GSWASIC00009939.
[1464] GSWASIC00008862 at 8864.
[1465] GSWASIC00008862 at 8863.
[1466] T717.9–10 (Day 10).

research in the markets – Get Swift name came up in the NZ discussions. Not details.. Can you please share if there was an engagement there?"[1467]

857 On 28 September 2017, Mr Hunter responded to Mr Kapoor stating:

> Happy to take on and deploy NZ for you right away - it would be very very easy for us and we have a team ready to go. We haven't kicked off that just yet, but is a matter of being able to start in a week or two - we are planning on going through that process as soon as NZ was amenable.[1468]

858 On the same date, Mr Kapoor responded "Could you please share the background – pls don't reach out to the market directly".[1469] On the same date, Mr Hunter responded stating:

> I am not sure I understand. As you know we hold everything in high degree of confidentiality, so without a sync we are really not at direct liberty to get into the details … We are somewhat confused that on one hand it has been acknowledged that there are other options being evaluated, while on the other hand we have been asked not to try to win the market share. As a public company if we agreed to that we would be not [*sic*] fulfilling our fiduciary responsibility. . We really would love to d business with you , but at the same time we cannot remain passive unless we have an agreement in place detailing our common approach …[1470]

859 Mr Kapoor responded "My question was specific to NZ and if there is something confidential about that relationship, then I don't need to know".[1471]

860 During August and September 2017, Mr Sinha received demonstrations of the GetSwift product and its functionality from Mr Macdonald and his team. It was Mr Sinha's role to present GetSwift's product to Pizza Hut International's business units which have functional experts in the relevant markets. The business units were then responsible for coordinating a meeting with the relevant franchisee partners in order to identify the markets to conduct two pilot tests.[1472]

Pizza Hut International unable to secure two test markets for the Pilot

861 During late August and September 2017, the relevant business units of Pizza Hut International were assessing which countries would be most suitable for the pilot test. Once the relevant

[1467] GSWASIC00008862 at 8863.
[1468] GSWASIC00008862.
[1469] GSWASIC00008862.
[1470] GSWASIC00008862.
[1471] GSWASIC00008862.
[1472] Sinha Affidavit (GSW.0009.0017.0001) at [38].

country was tested, the intention was to conduct a discovery phase in relation to the existing point of sale systems to work out how to integrate the GetSwift software.[1473] The discovery phase typically involves learning how the local market manages their driver or fleet of drivers, and then putting into place an implementation plan of the technology and operational functions to perform an effective pilot test.[1474]

862 Mr Sinha's objective for Pizza Hut franchisees was to be able to deliver at a faster pace in order to maintain the quality of the pizza. As such, there was a set of requirements that formed part of the "accepted criteria" for the pilot tests. The acceptance criteria received input from various functions and teams including operations and finance, and were documented and provided to GetSwift in the second half of 2017. The acceptance criteria provided to GetSwift took the same form as the acceptance criteria document attached to the email sent by Mr Macdonald on 24 August 2017 (as described at [844]).[1475]

863 During late August and September, Mr Sinha made various enquiries in order to identify an appropriate market for the pilot test; a process which typically took weeks to months.[1476] During September 2017, Pizza Hut International had not received much interest from Hong Kong franchisees in relation to conducting a pilot test in that market. In India, the franchisees were already conducting some pilot tests with other service providers at more competitive costs. Indeed, it was Mr Sinha's understanding that the franchisees in India were testing a product similar to GetSwift for around 1 cent per delivery.[1477] Mr Sinha communicated to GetSwift that Hong Kong and India were not agreeing to undertake a pilot for various reasons.[1478]

864 Further, Mr Sinha understood, from conversations that he had with the franchise operations manager in New Zealand for Restaurant Brands New Zealand (an independently owned franchisee), that the New Zealand team had independently downloaded the GetSwift software

[1473] Sinha Affidavit (GSW.0009.0017.0001) at [39].
[1474] Sinha Affidavit (GSW.0009.0017.0001) at [39].
[1475] Sinha Affidavit (GSW.0009.0017.0001) at [40]; GSWASIC00012529.
[1476] Sinha Affidavit (GSW.0009.0017.0001) at [41].
[1477] Sinha Affidavit (GSW.0009.0017.0001) at [41].
[1478] T725.7–11 (Day 10); T725.34–37 (Day 10).

from its website, had considered a number of other service providers and had decided not to proceed with GetSwift.[1479]

865 As of late September 2017, Mr Sinha was still looking to identify two markets in which to conduct the pilot test. Mr Sinha spoke to Pizza Hut International's Middle Eastern team in Dubai and to the European partners in London to enquire as to whether there were any potential markets there. He also spoke to the Pizza Hut International team in Latin America for Peru. However, despite Mr Sinha's extensive various enquiries, Pizza Hut Kuwait was the only market that eventually showed interest in conducting a pilot of the GetSwift's product.[1480]

866 By October 2017, GetSwift had conducted demonstrations for the GetSwift product to at least four or five potential markets, namely Hong Kong, Kuwait, the United Kingdom, Peru and possibly India.[1481]

867 By early October 2017, Mr Sinha and GetSwift were discussing entry into an "information technology master services agreement".[1482]

Non disclosure Agreement

868 On 11 October 2017, Mr Sinha sent an email to Mr Macdonald (copied to Mr Hunter and Mr Kapoor), attaching an executed copy of a "Mutual Confidentiality and Non-Disclosure Agreement" (**MCNDA**) between GetSwift and Yum! Restaurants International, Inc, together with its subsidiaries and affiliates, regarding the use and reciprocal exchange of confidential information.[1483] This was a requirement of Yum's legal team.[1484]Around October 2017, Yum and GetSwift were sharing information on an ongoing basis.

Revised Proposal by GetSwift

869 By early October 2017, Mr Sinha and GetSwift were discussing entry into an Information Technology Master Services Agreement (**MSA**).[1485]

[1479] Sinha Affidavit (GSW.0009.0017.0001) at [42].
[1480] Sinha Affidavit (GSW.0009.0017.0001) at [43].
[1481] Sinha Affidavit (GSW.0009.0017.0001) at [44].
[1482] T696.43–45 (Day 10).
[1483] GSWASIC00007185 attaching GSWASIC00007186; Sinha Affidavit (GSW.0009.0017.0001) at [45]–[46].
[1484] Sinha Affidavit (GSW.0009.0017.0001) at [47].
[1485] T696.43–45 (Day 10).

870 On 24 October 2017, Mr Macdonald sent an email to Mr Sinha (copied to Mr Hunter) attaching a copy of a revised proposal.[1486] In this email Mr Macdonald stated: "What we would like to do is get the MSA in place in the next two weeks so we can start panning [*sic*] accordingly and start assigning the staffing resources for the future implementation and roll out".[1487] The revised proposal referred to a more competitive pricing structure than the Initial Proposal in that it included a three-tier pricing structure with the first tier starting at a discounted rate of 5.5 cents per delivery for the first 999,999–1,999,999 deliveries per month. The price structure ranged from 3.65 to 5.5 cents (USD) per delivery transaction.[1488] The revised proposal referred to the 20 markets that Mr Sinha had identified as potential markets if GetSwift pilot tests were successfully completed.

871 The remaining terms were substantially the same as the Initial Proposal (described above at [844]). Notably, cl 3 of the revised proposal continued to state that Yum would "exclusively" engage GetSwift to provide the relevant services. Further, cl 7 titled "Miscellaneous", stated: "This proposal is a preliminary assessment based on the provided information. A Global MSA covering all regions will be part of this agreement."[1489]

872 At that point in time, Mr Sinha was contemplating entering into a MSA with GetSwift that would apply to all regions in which Yum conducted business.[1490]

873 Mr Sinha responded and said that he had reviewed the information that Mr Macdonald had sent, noting:

> … As shared with Bane, given that we have a franchised business we can accord Get swift a preferred vendor status off the back off a superior solution and attractive pricing. We will not be able to provide exclusivity.
>
> …
>
> 3. The term should be 39 months, 3 months' trial period and 36 months' term.
>
> 4. Lastly, I propose the following tiers and pricing:
>
> - Tier 1: 0-999999 USD$0.040

[1486] GSWASIC00006300 attaching GSWASIC00006301.
[1487] GSWASIC00006300.
[1488] GSWASIC00006301; Sinha Affidavit (GSW.0009.0017.0001) at [48].
[1489] GSWASIC00006301.
[1490] T700.20–36 (Day 10).

- Tier 2: 1,000,000-3,999,999 USD$0.350
- Tier 3: 4,000,000+ USD$0.30[1491]

874 Mr Sinha concluded his email by noting that he was meeting with the "Kuwait team" the following week and that he had also "set up a meeting with our Pizza Hut US friends to share the solution with them and may need to call on you for a demo soon".[1492] At that stage, Mr Sinha had already identified Kuwait as a potential trial market for the GetSwift platform.[1493]

875 Mr Hunter responded in an email copied to Mr Macdonald, stating:

> Most of your points are ok. We will make the adjustment.
>
> We understand the franchise model of course - but what we seek is exclusivity from HQ side of things. So how about a compromise where we are the exclusively endorsed by Yum Corporate HQ as the preferred global supplier for last mile logistic solution? There is a bit of confusion in the marketplace we are trying eliminate.
>
> And last but not least can we do last tier 4m+ at 0.325?[1494]

876 In response, Mr Sinha sent a further email to Mr Hunter, (copied to Mr Macdonald), in which he stated:

> The exclusivity clause is really difficult for us to include simply because the nature of our organization and us not having total visibility around what other are in our business are doing or going to do over the next 3 years. Our MSA that we will send you latest by tomorrow is agreed by all our brands globally and if Getswift signs it without any amendments than that opens the door technically for you across all brands- PH, KFC and TB. This will save you the hassle of renegotiations and administrative delays. Once we have a successful "proof of concept" we will endorse Getswift as our preferred vendor and I feel you have offered us an attractive price and combined with a great solution you should be able to achieve all your goals without having to spell it out. I would encourage you to agree with the preferred vendor status and have the options open to you.[1495]

877 In cross-examination, Mr Sinha gave evidence that the MSA did not guarantee implementation of the services to be provided under the agreement in any market[1496] and maintained that the statement in his email to Mr Macdonald that the proposed MSA "opens the door technically

[1491] GSWASIC00037858.
[1492] GSWASIC00037858.
[1493] T701.40–44 (Day 10).
[1494] GSWASIC00037858.
[1495] GSWASIC00037858.
[1496] T700.32–33 (Day 10).

for you across all brands" was intended to do no more than highlight to Mr Hunter the administrative convenience of an MSA in the event that GetSwift entered into negotiations with any other of Yum's businesses at a future point in time.[1497] Indeed, Mr Sinha agreed that the MSA spared suppliers from having to renegotiate "the standard terms and conditions, the nuts and bolts of the agreement already in place"[1498] and that the MSA had been "fastened upon by Yum across all its brands and across all its suppliers worldwide" such "that the commercial terms, then, are the only things that need to be bargained about when you're entering into a new agreement".[1499]

878 Further, Mr Sinha accepted that he was at least conveying to GetSwift that "they should be able to achieve [the] goal of being the exclusive supplier to Pizza Hut International franchisees, if there was a successful trial".[1500] He stated that he understood Mr Hunter was requesting GetSwift be endorsed across all Pizza Hut International as the preferred supplier of last mile logistics,[1501] however, was resolute that Pizza Hut International could not guarantee exclusivity.[1502] Indeed, despite repeated and forceful questioning by the cross-examiner, Mr Sinha maintained that his email to Mr Hunter on 24 October 2017 (as described above at [870]) was not intended to, and did not, convey to Mr Hunter the possibility that GetSwift would become the supplier of delivery tracking and logistics software for all Yum brands globally.[1503]

879 Later that day, Mr Hunter replied by email, stating: "Thanks – great and that is acceptable".[1504] Mr Macdonald then sent an email to Mr Sinha and Mr Hunter, attaching a further revised proposal.[1505] In the further revised proposal, the previous language in cl 3 stipulating that Yum would "exclusively" engage GetSwift to provide the services was replaced with the words "[Yum] endorses GetSwift as its preferred global supplier".[1506] Clause 4 of the further revised proposal also contained a 39-month term which included a three-month trial period (as

[1497] T703.38–704.11 (Day 10); T705.31–705.45 (Day 10).
[1498] T704.17–19 (Day 10).
[1499] T704.17–25 (Day 10).
[1500] T707.26–30 (Day 10).
[1501] T702.34–40 (Day 10); T703.16–19 (Day 10); T706.38–46 (Day 10).
[1502] T699.508 (Day 10).
[1503] T705.31–706.33 (Day 10); T707.36–708.12 (Day 10).
[1504] GSWASIC00037839.
[1505] GSWASIC00037839 attaching GSWASIC00061587.
[1506] GSWASIC00061587.

suggested by Mr Sinha).[1507] The fees set out in cl 5 reflected the pricing that Mr Sinha had agreed with Mr Hunter in their email exchange. Mr Sinha agreed in cross-examination that he regarded the commercial terms of the further revised proposal as being satisfactory from Yum's perspective.[1508]

Negotiations of the MSA

880 On 25 October 2017, Mr Sinha sent an email to Mr Hunter and Mr Macdonald attaching a standard form Information Technology Master Services Agreement (**Overarching MSA**).[1509] In this email, Mr Sinha stated:

> Hi Bane/Joel
>
> Please find the MSA attached. This is an MSA which is aligned and agreed with all brands any changes to this would mean, in future, if you were to partner with our other brands you would have to start at this point again for that individual brand. However, if there are no changes then you could use this overarching MSA with Yum with all brands.[1510]

881 Mr Sinha's objective was to get a test completed quickly and recognised that if there were changes to the Overarching MSA, it would be time consuming to negotiate a separate MSA with amendments with Pizza Hut International's legal team.[1511]

882 The draft MSA attached to Mr Sinha's email stated that Yum Restaurant Services Group, LLC was entering into the agreement "on behalf of and for the benefit of itself, and, as applicable, one or more of its US and international commonly owned affiliates, which currently include Taco Bell, Pizza Hut, LLC, KFC Corporation and Yum! Restaurants International, Inc".[1512] Mr Sinha accepted that Yum was proposing to enter into the MSA effectively on behalf of all Yum brands.[1513] Mr Macdonald forwarded Mr Sinha's email to Mr Eagle and stated: "Let's discuss".

[1507] GSWASIC00037858 at 7859.
[1508] T709.13–14 (Day 10).
[1509] GSWASIC00006020 attaching Overarching MSA (GSWASIC00006021).
[1510] GSWASIC00006020.
[1511] T705.36–45 (Day 10).
[1512] Overarching MSA (GSWASIC00006021).
[1513] T710.9–17 (Day 10).

Mr Macdonald followed up the email stating "One comment already is – We need to be named execs in this MSA".[1514] Mr Eagle responded "ok".[1515]

883 On 29 October 2017, Mr Eagle sent an email to Mr Hunter and Mr Macdonald attaching a marked up copy of the draft MSA for their review.[1516] Mr Hunter responded by email (copied to Mr Macdonald) instructing Mr Eagle to prepare an executive summary of the changes Mr Eagle had made to the draft MSA.[1517]

884 On 30 October 2017, Mr Macdonald sent an email to Mr Sinha attaching an updated draft MSA containing GetSwift's comments and amendments, in mark-up.[1518] On 31 October 2017, Mr Eagle sent an email to Mr Macdonald and Mr Hunter asking if the mark up to the MSA had been sent to Mr Sinha, as Mr Eagle had further suggested changes.[1519]

885 During late October 2017, Mr Sinha engaged in negotiations with Mr Hunter and Mr Macdonald regarding pricing. A three tier pricing structure was discussed, with the first tier being up to 2 million deliveries per month; the second tier being up to 4 million deliveries per month; and the third tier being a catch all, with over 4 million deliveries per month. Mr Sinha's expectation was that Pizza Hut International franchises would operate in the second tier range of deliveries and would not reach 4 million deliveries "in the near term".[1520]

886 Mr Sinha explained that, had a successful pilot test been completed, Pizza Hut International would have had the confidence to approach its franchisees and recommend the GetSwift product for integration with their fleet management system.[1521] He said that it would have been up to the individual franchisees as to whether they would like to adopt the product, but Pizza Hut International would have played a part in influencing the franchisees.[1522] Yum owns a small number of Pizza Hut stores, however, it was minimal as of 1 January 2017, and it was

[1514] GSWASIC00005974.
[1515] GSWASIC00005974.
[1516] GSWASIC00067265.
[1517] GSWASIC00067265.
[1518] GSWASIC00054482.
[1519] GSWASIC00055031 attaching GSWASIC00068699.
[1520] Sinha Affidavit (GSW.0009.0017.0001) at [51].
[1521] Sinha Affidavit (GSW.0009.0017.0001) at [53].
[1522] T707.23–24 (Day 10); Sinha Affidavit (GSW.0009.0017.0001) at [53].

only in the UK, South Africa and Canada.[1523] However, Mr Sinha never contemplated that the GetSwift product would be tested or deployed to a Pizza Hut store owned by Yum in the UK, South Africa and Canada as he was not part of the relevant team responsible for those stores.[1524]

887 On 16 November 2017, Mr Sinha sent an email to Mr Hunter and Mr Macdonald (copied to Mr Kapoor and Mr Raj Gupta of Yum), attaching a marked up version of the MSA.[1525] In this email, Mr Sinha, stated "Please review and advise, I haven't had a chance to review but wanted to share so I am not holding back".[1526] Mr Macdonald forwarded Mr Sinha's email to Mr Eagle.[1527] Mr Eagle's response to those comments (copied to Mr Hunter) are redacted and subject to a claim for legal professional privilege by GetSwift.[1528]

888 Following this, Mr Macdonald sent Mr Eagle and Mr Hunter a revised MSA agreement containing Yum's comments.[1529] Mr Eagle made comments and suggested to Mr Hunter and Mr Macdonald that he liaise directly with Yum's legal counsel (Ms Adams) to finalise the MSA.[1530] Mr Hunter responded (copied to Mr Macdonald) in his characteristically demanding style: "ok I have pinged Devesh and asked for an intro to Traci. Stand by. This needs to be in place next week BEFORE thanksgiving".[1531] Mr Macdonald also responded noting: "[t]his is great work on the Yum MSA Brett".[1532]

889 On 18 November 2017, Mr Hunter sent an email to Mr Eagle, Mr Sinha and Mr Macdonald, in which he stated, "Brett, I am including you on this thread so that Devesh can introduce you directly to Traci and so we can get the global MSA in place before thanksgiving please. Let's expedite this …"[1533] Mr Sinha responded to Mr Hunter's email (copied in Ms Adams), stating that Mr Eagle and Ms Adams could work directly with each other.[1534]

[1523] Sinha Affidavit (GSW.0009.0017.0001) at [54].
[1524] Sinha Affidavit (GSW.0009.0017.0001) at [54].
[1525] GSWASIC00054482 attaching GSWASIC00052651.
[1526] GSWASIC00054482.
[1527] GSWASIC00066468.
[1528] GSWASIC00066468.
[1529] GSWASIC00066468.
[1530] GSWASIC00054418.
[1531] GSWASIC00054418.
[1532] GSWASIC00054362 at 4364.
[1533] GSWASIC00054340 at 4341.
[1534] GSWASIC00054340.

890 On 20 November 2017, Mr Eagle sent an email to Mr Sinha, Mr Hunter and Ms Adams (copied to Mr Macdonald), attaching a marked up copy of the draft MSA, noting that the attached document with mark-up showed "discussion points/clarifications".[1535]

891 On 28 November 2017, there were a number of emails between Mr Eagle and Ms Adams in relation to the draft MSA. In that correspondence, Ms Adams stated:

> The SOW [statement of work] has not been completed for this project so several things will be added to the SOW such as agreed upon the language in Section 5.2… The teams will need to work on SOW using the form attached in the MSA. They will work out deliverables, timing, pricing etc.[1536]

892 Mr Eagle responded, stating, among other things: "yes understood".[1537]

Yum MSA

893 On 28 November 2017, GetSwift and Yum, on its own behalf and on behalf of its commonly owned affiliated companies, signed an Information Technology Master Services Agreement (**Yum MSA**).[1538] Mr Macdonald signed the Yum MSA on behalf of GetSwift. In summary, the Yum MSA provided, among other things:

(1) GetSwift would "deliver to Yum or designated entities within the Yum System the Services and Deliverables described in each SOW" (cl 2.1 of the Yum MSA). The following words (among others) were defined in cl 1:

   (a) Services: management, technical, financial, software development or other information technology related services to be provided by GetSwift to Yum (cl 1.4);

   (b) Deliverables: the specific product(s) to be provide by GetSwift as a result of or in connexion with services under the Statement of Work (SOW) (cl 1.2); and

   (c) Statement of Work ("SOW"): the specific agreement from time to time by which Yum as a customer may engage GetSwift to perform services and provide deliverables. The agreed upon form of SOW was attached to the MSA (cl 1.5).

[1535] GSWASIC00054340 attaching GSWASIC00052579.
[1536] GSWASIC00054057.
[1537] GSWASIC00054057.
[1538] Yum Announcement (GSWASIC00028619); Sinha Affidavit (GSW.0009.0017.0001) at [59].

(2) The term of the MSA begins on 28 November 2017 and will continue until terminated in accordance with cl 12 of the MSA (cl 12.1 of the Yum MSA);

(3) The Yum MSA may be terminated as any time that there is no uncompleted SOW outstanding, then GetSwift or Yum may terminate the Yum MSA for any or no reason upon 30 days advance written notice (cl 12.2(a) of the Yum MSA);

(4) Yum may terminate for convenience any SOW by providing GetSwift with at least ten days written notice (cl 12.2(b) of the Yum MSA); and

(5) GetSwift "understands and agrees that its Services and Deliverables under this Agreement and under any SOW may be used by or for the benefit of the Yum System or any entity within the Yum System" (cl 16.1 of the Yum MSA). "Yum System" was defined in the recitals to mean, relevantly, Yum and "the participating franchisees, licensees and joint ventures" of the Taco Bell, KFC and Pizza Hut brand.

894 On 29 November 2017, upon receipt of the executed copy of the Yum MSA, Mr Eagle sent an email to Ms Adams stating, "thanks so much … And now onto the rollout and SOWs".[1539] Ms Adams replied stating, "Thanks for your partnership! I have reminded our team to begin working on the SOWs".[1540]

895 As at 1 December 2017, no SOW had been issued by Yum or any of its affiliates, nor had any pilot tests commenced.[1541]

Preparation and Release of the Yum Announcement

896 On 24 November 2017, Mr Hunter sent an email to Mr Eagle and Mr Macdonald attaching a draft ASX announcement concerning GetSwift's entry into the Yum MSA, in which he stated "Pls review and format as required in our new template. I expect Yum to be signed shortly and this is ready to go before the AGM".[1542] By this time, Ms Gordon had resigned as a director of GetSwift (which occurred on 15 November 2017) and Mr Hunter's email was addressed to Mr Eagle and Mr Macdonald as the remaining directors.

[1539] GSWASIC00061404.
[1540] GSWASIC00061399.
[1541] Sinha Affidavit (GSW.0009.0017.0001) at [64].
[1542] GSWASIC00004189 attaching GSWASIC00034345.

897 On 28 November 2017, Mr Eagle, Mr Hunter and Mr Macdonald exchanged emails about Yum.[1543] The substantive content of the email exchange is redacted and subject to a claim for legal professional privilege by GetSwift.

898 On 29 November 2017, at 12:30am, Mr Eagle received a copy of the executed Yum MSA[1544] and Mr Eagle forwarded an executed copy to Mr Hunter and Mr Macdonald.[1545] By (at the latest) 29 November 2017, Mr Eagle was therefore familiar with the terms of the Yum MSA and the fact that SOW were yet to be agreed.[1546] Sometime during this time, there was then an email exchange ending with an email from Mr Eagle to Mr Hunter (copied to Mr Macdonald).[1547] The substantive content of the email exchange is redacted and subject to a claim for legal professional privilege by GetSwift.

899 At 8:12am, Mr Hunter sent an email to Mr Eagle (copied to Mr Macdonald), stating "Get trading halt to go at 11:30am please".[1548] At 8:35am, Mr Banson sent an email to Mr Eagle, Mr Hunter and Mr Macdonald attaching, for their review, a draft of the request for a trading halt until the commencement of trading on Friday 1 December 2017 or until the release of the Yum Announcement, whichever occurred first.[1549] Mr Hunter replied (copied to Mr Eagle and Mr Macdonald), in which he stated, "[n]eeds to have "significant commercial agreement" Ps pls hold until Joel reviews".[1550]

900 At 11:33am, Mr Banson sent an email to Mr Hunter, Mr Macdonald and Mr Eagle notifying them that GetSwift had been placed in a trading halt.[1551] At 11:39am, the ASX released an announcement that the securities of GetSwift were placed in a trading halt, at the request of the company, pending the release of an announcement and that the trading halt was to remain until the earlier of the announcement or the commencement of trading on 1 December 2017.[1552]

[1543] GSWASIC00070963.
[1544] GSWASIC00061408 attaching GSWASIC00034196.
[1545] GSWASIC00061414.
[1546] MCS at [524].
[1547] GSWASIC00066465.
[1548] GSWASIC00061412.
[1549] GSWASIC00054063 attaching GSWASIC00054065.
[1550] GSWASIC00054054.
[1551] GSWASIC00054054.
[1552] GSW.1001.0001.0291.

901 At 6:03pm, Mr Macdonald sent an email to Mr Polites and Ms Hughan (copied to Mr Hunter), attaching copy of the draft announcement concerning GetSwift's entry into the Yum MSA.[1553] This version was identical to the version drafted by Mr Hunter and circulated on 24 November 2017, save that it included the following addition to a quote attributed to Mr Hunter: "This latest partnership reaffirms and validates once and for all that GetSwift is a true global disruptor in scale, product and commercial proposition".[1554] At 6:08pm, Mr Hunter sent an email to Mr Macdonald commenting on the drafting of the draft announcement, proposing the terms "have commenced" be changed to "will commence".[1555]

902 On 30 November 2017, Mr Eagle sent an email to Mr Hunter and Mr Macdonald attaching an updated draft of the announcement concerning GetSwift's entry into the Yum MSA.[1556] In this email, Mr Eagle stated:

> Gents,
>
> I think in this particular announcement being a little bit legalistic has a powerful impact – see my language making clear up front that this agreement covers not just the ownership/affiliated chain of companies but also the franchisees, licensees and joint ventures – in the US and internationally. The language is lifted straight from our contract!
>
> Let me know your thoughts – otherwise also understand it still needs to be formatted on our current template(?). [*sic*] And Danny is waiting to review as well – once on the current template etc.
>
> Also note have changed the date – it was December 1st 2018 (which is good forward planning; but suggest 2017 for this one).[1557]

903 In the attached draft announcement, Mr Eagle made the following changes:

> **GetSwift Limited (ASX: GSW)** ('GetSwift' or the 'Company'), the SaaS solution company that optimises delivery logistics worldwide, is pleased to announce that it has signed an exclusive multiyear partnership with ~~Yum brands~~ Yum Restaurants Services Group LLC for the benefit of itself, its U.S. and international affiliates which currently include Taco Bell Corp., Pizza Hut LLC, KFC Corp. and Yum! Restaurants International, Inc (each a "Yum Brand" and together, "Yum"); and also for the benefit of the franchisees, licensees and joint ventures of each Yum Brand.
>
> Yum ~~brands~~ is a Fortune 500 corporation~~, Yum! Operates the brands Taco Bell, KFC,~~

[1553] GSW.0019.0001.8580 attaching GSW.0019.0001.8581.
[1554] GSW.0019.0001.8581.
[1555] GSWASIC00004147.
[1556] SWI00019038_UR attaching GSWASIC00068640_UR.
[1557] SWI00019038_UR.

~~Pizza Hut and WingStreet worldwide~~ and …[1558]

904 On or about 31 November 2017, Mr Hunter sent Mr Sinha a text message to the effect that Mr Hunter had some mandatory or statutory statements which he was required to make to the ASX about the signing of the MSA and that he was going to go ahead and do that. Mr Sinha responded "okay" and wished him luck.[1559] It should be noted that, as the chronology will reveal, the Yum announcement was not approved by Yum nor was Yum consulted as to its contents prior to the release of the announcement.[1560]

905 On 1 December 2017, at 8:28am, Mr Macdonald sent an email to Mr Banson (copied to Mr Eagle and Mr Hunter) attaching a copy of an announcement concerning GetSwift's entry into an MSA with Amazon, and a separate announcement concerning GetSwift's entry into the Yum MSA.[1561] In this email, with the subject line "2 ASX Announcements today (game changers)", Mr Macdonald stated:

> Can you please submit these two attachments asap to be released not before 945am today.
>
> These will both obviously be price sensitive![1562]

906 Save for the change to the date of the announcement, the Yum Announcement attached to Mr Macdonald's email did not incorporate Mr Eagle's suggested substantive changes.[1563]

907 At 8:37am, Mr Banson replied to Mr Macdonald's email, and stated that he will release it at 9:30am "as just discussed with Brett".[1564] At 9:20am, GetSwift submitted to the ASX an announcement entitled "Yum! Brands and GetSwift Sign Multi Year Partnership" (**Yum Announcement**) and requested it be released as "price sensitive".[1565] At 9:43am, Mr Eagle sent an email, with the subject line "ASX crap", to Mr Hunter and Mr Macdonald, in which he stated:

> Gents, getting push back from ASX – Bane you owe me 50 bucks….

[1558] GSWASIC00068640_UR.
[1559] Sinha Affidavit (GSW.0009.0017.0001) at [66].
[1560] Sinha Affidavit (GSW.0009.0017.0001) at [65].
[1561] GSWASIC00004073 attaching GSWASIC00034171, and GSWASIC00034169.
[1562] GSWASIC00004073.
[1563] GSWASIC00034171; ECS at [361].
[1564] GSW.0031.0002.3481.
[1565] Yum MSA (GSW.1001.0001.0318); Agreed Background Facts (GSW.0002.0002.0001) at [89].

> They want a dollar figure for the Yum announcement – can you give some thought quick to what we might throw in there.[1566]

908 At 9:47am, Mr Hunter sent an email to Mr Eagle (copied to Mr Macdonald) stating:

> Nope - point out the Yoji announcement - no rev yet marked price sensitive. Fk em - tell them we are scheduled to CNBC , wsj and AFR - so let's see if they like that.[1567]

909 At 9:49am, Mr Eagle responded stating, "sorted ☺".[1568]

910 At 9:56am, the ASX released the Yum Announcement as "price sensitive".[1569]

911 The Yum Announcement stated, among other things:

(1) "[GetSwift] is pleased to announce that it has signed an [*sic*] global multiyear partnership with Yum! Brands";

(2) "Yum! is a Fortune 500 corporation and operates the brands of Taco Bell, KFC, Pizza Hut and WingStreet worldwide";

(3) "In order to compete aggressively in this market Yum has partnered with GetSwift to provide its retail stores globally the ability to compete with their global counterparts when it comes to deliveries and logistics";

(4) "[GetSwift] estimates that more than 250,000,000 deliveries annually will benefit from its platform as a result of this partnership after implementation" (Yum Deliveries Projection); and

(5) "initial deployments will commence in the Middle East and Asia Pacific, with more than 20 countries slated to be rolled out in the first and second phase, followed by a broader deployment thereafter" (**Yum Rollout Projection**).

912 At 9:58am, Mr Hunter sent an email to Mr Eagle (copied to Mr Macdonald), stating, "Release the A pls !"[1570] At 10:04am, Mr Banson sent an email to Mr Macdonald, Mr Eagle (copied to

[1566] GSWASIC00052522.
[1567] GSWASIC00052522.
[1568] GSWASIC00052522.
[1569] Yum Announcement (GSW.1001.0001.0318); Agreed Background Facts (GSW.0002.0002.0001) at [89].
[1570] GSWASIC00004068.

Mr Hunter) in which he informed them that the trading halt had been lifted and both the Amazon Announcement and the Yum Announcement had been marked as price sensitive.[1571]

Pizza Hut International's reaction to the Yum Announcement

913 On 2 December 2017, Mr Sinha sent an email to Mr Hunter requesting a copy of the Yum Announcement because he had been asked questions about the press coverage that GetSwift had been receiving.[1572] Mr Hunter sent an email in response to Mr Sinha's email (copied to Mr Eagle and Ms Adams) stating:

> There was no press or PR initiated or accepted by the company - all that we did was put out a notice with disclosure of our agreement as stipulated by the ASX. It was a rather hectic day where we even had trading suspended since we overall were just barely covering the minimum disclosure requirements for the Yum agreement and not for the Amazon one. In either case I have cc Brett who will be happy to send you the release and answer any questions from a regulatory perspective.[1573]

914 Mr Eagle sent an email to Mr Sinha, Ms Adams and Mr Hunter attaching a copy of the Yum Announcement.[1574] On 22 December 2017, Mr Kapoor sent an email to Mr Hunter in which he stated:

> … As you know, although we have signed an MSA implementation in any specific country remains under negotiations. In the spirit of partnership, I would like to take this opportunity that any disclosure or announcement related to Pizza Hut requires our consent … Please confirm that you will comply with the requirements set forth above.[1575]

915 On 22 December 2017, Mr Hunter responded to Mr Kapoor stating that he had copied Mr Macdonald and Mr Ozovek on the email to "make sure from a compliance perspective they enforce this approach".[1576] Mr Sinha spoke to Mr Hunter within days following the release of the Yum Announcement to ask him why he released an announcement containing so many inaccurate statements and why he had released it to the press without seeking Pizza Hut International's approval.[1577]

[1571] GSWASIC00004065.
[1572] GSWASIC00034124.
[1573] GSWASIC00034124.
[1574] GSWASIC00034124 attaching GSWASIC00034126.
[1575] GSWASIC00033755.
[1576] GSWASIC00033750.
[1577] Sinha Affidavit (GSW.0009.0017.0001) at [70].

916 Mr Sinha explained that the following statements in the Yum Announcement do not represent the relationship that was in existence between GetSwift and Yum at the time:

(1) "GetSwift…is pleased to announce that it has signed an [*sic*] global multiyear partnership with Yum! Brands ("Yum!")"; and

(2) "In order to compete aggressively in the market Yum! has partnered with GetSwift to provide its retail stores globally and the ability to compete with their global counterparts when it comes to deliveries and logistics".[1578]

917 The partnership was only ever intended to apply to Pizza Hut International (i.e. it was never intended to extend to the USA or China) and it was conditional on prior successful completion of two pilots; in this sense, GetSwift was only a potential vendor at this time.[1579]

918 Further, Mr Sinha explained the statements in the Yum Announcement were incorrect:

(1) "[GetSwift] estimates that more than 250,000,000 deliveries annually will benefit from its platform as a result of this partnership after implementation";

(2) "Initial deployments will commence in the Middle East, and Asia Pac, with more than 20 countries slated to be rolled out in the first and second phase, followed by a broader deployment thereafter. The company will be focussed on concurrent multi regional rollouts to speed up global coverage"; and

(3) "The support we have received from the senior leadership of Yum not only in their HQ in Dallas but in every international region we met with has made this global program an absolute joy to structure and agree to. …"[1580]

919 In respect of the (1), Mr Sinha noted that Pizza Hut International does not do that many deliveries and he is not aware of how the 250 million figure was calculated. To Mr Sinha's knowledge, no one at Pizza Hut International provided GetSwift with the 250 million figure or any other information to support such a figure.[1581]

920 In respect of the (2), Mr Sinha said:

[1578] Sinha Affidavit (GSW.0009.0017.0001) at [67(a)]–[67(b)].
[1579] Sinha Affidavit (GSW.0009.0017.0001) at [67].
[1580] Sinha Affidavit (GSW.0009.0017.0001) at [67(c)].
[1581] Sinha Affidavit (GSW.0009.0017.0001) at [67(c)].

> This statement is incorrect. Pizza Hut International had not discussed or agreed with GetSwift to deploy the GetSwift product to 20 countries with GetSwift. Only 2 pilot tests were to be conducted at this stage, although the two markets in which to conduct the pilots had not been determined as of 1 December 2017. A possible deployment of 20 countries was, at a minimum, conditional upon successful completion of these pilot tests. We did not confirm with GetSwift that Hong Kong was a potential market, because that market had not shown any interest in the GetSwift product. To the best of my memory, Kuwait was not confirmed as a market for a pilot test until about January of 2018.[1582]

921 In respect of the (3), as Mr Sinha noted, there was no global programme on foot and GetSwift was only a *potential* service provider to Pizza Hut International.[1583]

922 Mr Sinha made clear that in late November 2017, at the time of the Yum MSA was executed, he *intended* to proceed with trials of the GetSwift software and, if such trials were successful, roll out the GetSwift platform to Yum franchisees pursuant to SOWs under the MSA.[1584] Mr Sinha expected that trials would take place in at least two markets, one of which would be Kuwait,[1585] but he had not decided the two markets and was engaging in discussions with the operations team in the different regions.[1586]

923 In cross-examination, Mr Sinha initially did not accept that he had identified Hong Kong as the second trial market at the time of entry into the MSA.[1587] Indeed, he went so far as to stated that "I would like to believe that by the time it came to 28 November, Hong Kong was not a possibility and we were having several calls trying to identify the second market, and we were unable to do that at that stage".[1588] This evidence, however, is contradicted by the contemporaneous documents. As I describe below at [936], on 9 December 2017, Mr Sinha sent an email to Mr Hunter, in which he enquired: "How is the progress with getting the SOW completed, I want us to get started on the HK and Kuwait test?"[1589] In any event, Mr Sinha ultimately conceded that in late November 2017, it was his *intention* that a trial of the GetSwift

[1582] Sinha Affidavit (GSW.0009.0017.0001) at [67(d)].
[1583] Sinha Affidavit (GSW.0009.0017.0001) at [67(e)].
[1584] T713.2–6 (Day 10).
[1585] T713.8–9 (Day 10); T719.4–9 (Day 10).
[1586] T719.40–720.24 (Day 10).
[1587] T713.42–44 (Day 10); T718.40–47 (Day 10).
[1588] T714.24–26 (Day 10).
[1589] GSWASIC00061280.

software would take place in the Hong Kong market,[1590] although no agreement had actually been reached for a trial to be conducted in Hong Kong.[1591]

924 Mr Sinha was also cross-examined about the answers he gave during his examination before the Securities and Exchange Commission (**SEC**). Mr Sinha agreed he told the SEC that, as at 27 September 2017, Yum had not received "a substantiated no from Hong Kong" in relation to the proposed testing.[1592]It was put to Mr Sinha that Hong Kong was subsequently persuaded to undertake a trial of the GetSwift software, to which he responded: "I honestly don't recall because we kept having conversations but I don't recall that they ever accepted that, yes, let's do a trial".[1593]

Complaint to ASX about Yum Announcement

925 On 8 December 2017, Mr Kabega sent an email to Mr Hains and Mr Banson (copied to Mr Eagle) in relation to the Yum Announcement in which he stated:

> ASX has received a complaint in relation to the announcement lodged by the Company on the ASX Market Announcements Platform on 1 December 2017, titled 'Yum! Brands and Getswift Sign Multi Year Partnership' in which the Company states the following:
>
> - "…it has signed an global multiyear partnership with Yum! Brands ("Yum")"
> - "In order to compete aggressively in this market Yum has partnered with GetSwift to provide retail stores globally…"
>
> In light of the Announcement and the issues raised in the complaint, the ASX requires the Company to clarify:
>
> 1. Whether its agreement with Yum include stores located in Canada, Cyprus, Israel or Singapore, or include stores with Yum Asia.
>
> If the answer to question 1 above is "No", ASX requires the Company to lodge with MAP a revised announcement to clarify which countries and/or regions are not included in the agreement with Yum.
>
> In addition, in relation to the agreement with Yum, is the agreement or is the use of the Company's software subject to any material conditions, such as pilot or testing period associated with each roll out, or any other material conditions. If so, ASX requires the

[1590] T725.29–32 (Day 10).
[1591] T718.35–38 (Day 10).
[1592] T717.9–12 (Day 10); GSWTB0034 at T58.22–59.3 (Day 1).
[1593] T717.23–26 (Day 10).

> Company to release a revised announcement including these material conditions.[1594]

926 On 11 December 2017, at 6:19am, Mr Eagle sent an email to Mr Banson (copied to Mr Macdonald and Mr Hunter) containing a draft response for Mr Banson to send to the ASX. Mr Eagle requested that Mr Banson send the request that morning before the market opened.[1595] At 8:41am, Mr Banson sent an email in response to Mr Kabega's email dated 8 December 2017, in which he stated:

> This confirms that there is no geographic restriction specified in the agreement with Yum. It is global. We also confirm that the agreement is not subject to any material conditions. We ask that you identify the party that complained in this matter. It concerns us given the specific nature of the query that it is really motivated by an attempt by one of our competitors to identify details in our commercial arrangements. Clearly this is not appropriate.[1596]

927 At 8:57am, Mr Kabega sent an email in response, (copied to Mr Eagle and Mr Hains), stating:

> Please note as indicated in our email that a confirmation with regards to whether or not the Company's agreement with YUM Brands include stores located in Canada, Cyprus, Israel or Singapore, or includes stores with Yum Asia is required before trading commences today.[1597]

928 At 9:03am, Mr Eagle sent another email to Mr Kabega stating:

> Andrew we have answered that question. What exactly is the concern with this? Please be more specific in your query. I am copying our external legal counsel and will discuss with him – perhaps he can give you the comfort you're looking for.[1598]

929 Following the email correspondence between Mr Eagle and Mr Kabega, Mr Hunter sent an email to Mr Eagle and Mr Macdonald.[1599] Mr Hunter's instructions to Mr Eagle have been redacted and are subject to a claim for legal professional privilege by GetSwift.

930 At 9:23am, Mr Kabega sent an email to Mr Banson and Mr Hains, (copied to Mr Eagle), in which he stated, "[a]s discussed on the phone, ASX would like the Company to categorically confirm that YUM Agreement includes stores located in Canada, Cyprus, Israel or Singapore,

[1594] GSWASIC00003959.
[1595] GSWASIC00061266.
[1596] GSWASIC00052493 at 2495.
[1597] GSWASIC00052493 at 2494.
[1598] GSWASIC00052493.
[1599] GSWASIC00052493.

or includes stores with Yum Asia."[1600] At 10:43am, Mr Eagle sent a further email to Mr Kabega (copied to Mr Hunter and Mr Macdonald), in which he stated :

> Andrew, this needs to go live asap. What is the hold up?
>
> Have copied our chairman and Man Dir.[1601]

931 The reference to "chairman" was of course to Mr Hunter, and the "Man Dir" was Mr Macdonald.[1602] At 10:47am, Mr Kabega responded stating that the announcement has been released and the trading halt lifted.[1603]

932 On 20 December 2017, Mr Hunter sent an email to Mr Eagle, Mr Banson and Mr Macdonald in which he stated:

> Gents,
>
> Please look at todays announcement that DTS [Dragontail Systems Ltd] put out. It is marked price sensitive yet has NO revenue numbers attached nor transactions. Plus it impacts us directly since it talks about Yum.
>
> I want your to lodge a formal complain with the ASX and seek written clarification on this. The dual standards are staggering.[1604]

Negotiation of the SOW and pilot in the Kuwait market

933 On 8 November 2017, Mr Scott Hudson, the Franchise Business Coach of Pizza Hut Middle East Turkey and Africa business unit of Pizza Hut International, forwarded an email from Kout Food Group to Mr Sinha and Mr Kapoor (copied together with personnel from Kout Food and Yum), in which he stated:

> Rohit & Devesh
>
> Please find attached and below the request for Get Swift to submit and Technical & Commercial proposal for the Kout team.
>
> Can you confirm that you will pass this through to them.
>
> They are expecting a response from Get swift by 20th November[1605]

[1600] GSWASIC00033922.
[1601] GSWASIC00033922.
[1602] ECS at [378].
[1603] GSWASIC00003875.
[1604] GSWASIC00003574.
[1605] GSWASIC00004314.

934 Kout is a Pizza Hut International's franchisee partner in Kuwait, and owns all of the Pizza Hut stores in Kuwait. Mr Sinha had introduced GetSwift to Kout in about September or October 2017.[1606] The request for Kout related to a pilot Kout wanted to conduct for its Pizza Hut stores in Kuwait, but also for its other three brands in Kuwait, namely Burger King, Taco Bell and Kababji.[1607] The Kout proposal referred to the deployment of the GetSwift software to 200 regional stores. Mr Sinha understood the 200 stores included stores of all four brands. The GetSwift software allowed the aggregation of drivers across multiple stores and multiple brands, and although Mr Sinha was hoping to do a pilot of Pizza Hut International only, by aggregating the drivers within each store, he thought they would be able to share the efficiencies generated by the participation of other brands.[1608]

935 On or about 19 November 2017, Mr Sinha sent an email to Mr Hudson and others at Pizza Hut International (copied to various representatives of Kout Food Group and Mr Macdonald and Mr Hunter), attaching the Kout Proposal documents for GetSwift to respond to.[1609] The Kout Proposal referred to a pilot period or proof of concept with approximate 6 month term and a price of 5 cents per delivery.[1610] The Kout Proposal documents were prepared by Kout and not Pizza Hut International.[1611]

936 On 9 December 2017, Mr Sinha sent an email to Mr Hunter stating, "how is the progress with getting the SOW completed, I want us to get started on HK and Kuwait test?"[1612] Mr Hunter replied (copying Mr Macdonald and Mr Ozovek) stating: "will revert back asap re the SOW".[1613] On 12 December 2017, Mr Sinha sent an email to Mr Hunter attaching a copy of the SOW template that could be edited.[1614] Mr Hunter forwarded the blank template to Mr Macdonald.[1615]

[1606] Sinha Affidavit (GSW.0009.0017.0001) at [55].
[1607] Sinha Affidavit (GSW.0009.0017.0001) at [56].
[1608] Sinha Affidavit (GSW.0009.0017.0001) at [57].
[1609] GSWASIC00004314 attaching GSWASIC00004318, and GSWASIC00004322.
[1610] GSWASIC00004322 at 4323.
[1611] Sinha Affidavit (GSW.0009.0017.0001) at [58].
[1612] GSWASIC000061280.
[1613] GSWASIC00061280.
[1614] GSWASIC00053707 attaching GSWASIC00053708.
[1615] GSWASIC00061168.

937 On 18 December 2017, Mr Hunter sent an email to Mr Sinha (copied to Mr Macdonald), attaching a copy of the proposed SOW in which he requested Mr Sinha's feedback and stated that he was happy to adjust.[1616] The proposed SOW had the two markets for the pilot as Kuwait and Hong Kong.[1617] Mr Hunter further noted that GetSwift had "secured a Cantonese speaking project manager for the HK region which we will send there".

938 In the draft SOW attached to Mr Hunter's email, the parties were listed as Yum Restaurant Services Group, LLC and GetSwift, Inc. Clause 1, which was titled "Summary of Services to be Performed", described the relevant services as "[e]xecution of a multi-regional deployment (Hong Kong and Kuwait) to optimize the delivery function, driver management, and dispatching of Pizza Hut through usage of the GetSwift platform." The proposed "term of engagement" in cl 2 was the period from 20 January 2018 to 20 January 2021.[1618]

939 In cross-examination, Mr Sinha agreed that at the time he received the draft SOW from Mr Hunter, Hong Kong was an *intended* trial market and he was discussing with GetSwift for trials to go ahead in Hong Kong and Kuwait.[1619] However, as noted above, although Hong Kong had been an intended trial market for the GetSwift solution from as early as late September 2017, Mr Sinha agreed with the cross-examiner that Hong Kong did not seem attracted to conducting a trial of the GetSwift Platform.[1620] He gave evidence of an ongoing effort throughout November and December 2017 to get Hong Kong to agree to be the pilot market for the trial. However, despite numerous conversations with the Hong Kong franchisees, it had not agreed to undertake the trial, and a second market to conduct the trial was never identified.[1621]

940 On the same date, Mr Sinha sent an email to Mr Hunter stating that, "the markets have signed up for a test not a rollout so the term dates would have to reflect the same". Mr Sinha suggested the term be from 1 January 2018 to 30 June 2018.[1622]

[1616] GSWASIC00053697 attaching GSWASIC00033833.
[1617] GSWASIC00033833.
[1618] GSWASIC00033833.
[1619] T718.1–12 (Day 10).
[1620] T717.9–21 (Day 10).
[1621] T721.45–722.21 (Day 10).
[1622] GSWASIC00053695.

941 On 19 December 2017, Mr Hunter sent a further email to Mr Sinha in which he stated that he would "tweak and resend" and that "in terms of volume I just wanted to make sure we have an [*sic*] valid number for testing and minimal spend commitment before we start supporting various regions in site from an ongoing basis. Either way not insurmountable".[1623]

942 On 21 December 2017, Mr Hudson sent an email to Mr Sinha (copied to Mr Kapoor and Mr David DePrez of Yum), stating that the Kuwait team had been reviewing their project lists and bandwidth and have ruled out the ability to run two fleet projects in parallel, and that the Kuwait team had decided to proceed with "Order Lord" (an alternative company) instead, because it offered a cheaper service than GetSwift.[1624] On the same day, Mr Sinha forwarded Mr Hudson's email to Mr Hunter and stated:

> Hi Bane
>
> Kuwait has chosen to run a pilot with Order Lord for inability to run 2 pilots and cost. Do you have a feature comparison with Order Lord that you can share? We would like to get these details to help our franchisee take the right decision. A quick turnaround will be appreciated. Thanks[1625]

943 On 28 December 2017, Mr Hunter sent an email to Mr Sinha (copied to Mr Ozovek and Mr Macdonald), attaching an updated proposed SOW.[1626] In his covering email, Mr Hunter noted that GetSwift would be "investing a substantial amount of capital and resourcing to make this work, including assigning a Cantonese speaking program officer to the HK team".[1627] In line with Mr Sinha's request, the "term of engagement" set out in the revised SOW was 15 January to 15 July 2018.[1628]

944 Between 4 January 2018 and 8 January 2018, Mr Sinha exchanged emails with Mr Hudson in relation to Kout's use of Order Lord and sought to ascertain whether Kout was still willing to conduct a pilot involving GetSwift in Kuwait.[1629] On about 8 January 2018, Mr Sinha had a telephone conversation with Mr Hudson regarding Kout and he informed Mr Sinha that Kout

[1623] GSWASIC00053686.
[1624] GSWASIC00053678.
[1625] GSWASIC00053678.
[1626] GSWASIC00003543 attaching GSWASIC00033696.
[1627] GSWASIC00003543.
[1628] GSWASIC00033696.
[1629] Sinha Affidavit (GSW.0009.0017.0001) at [74]; GSWASIC00002544.

was still willing to test GetSwift product provided that it matched Order Lord on price.[1630] Mr Sinha conveyed this information to Mr Hunter by email on 9 January 2018 and on the telephone on the same day.[1631]

945 On 15 January 2018, Mr Hudson sent an email to Messrs Sinha, Macdonald, Hunter and other personnel from the GetSwift and Kout teams, in which he outlined the criteria to be met and that it was awaiting for GetSwift's confirmation in order for Kout to undertake a trial. These conditions included, among other things, that GetSwift was to contract directly with Kout and the Pizza Hut International were to be advisors on functionality.[1632]

946 On 19 January 2018, Mr Sinha sent an email to Mr Hunter and other GetSwift personnel, attaching a further revised draft of the SOW in relation to the Hong Kong market for GetSwift's consideration.[1633] Mr Sinha described this being "almost final [except] a final review … from legal". Mr Sinha stated: "Once approved we will get each of our Business Units (this one is for Asia) to sign it with GetSwift and then the future SOW will be adoptions of this by our franchisee [*sic*], which will be managed by our Business Units". Mr Sinha requested that Mr Hunter "review the attached SOW and revert".[1634]

947 Clause 1 of the further revised SOW, which was titled "Summary of services to be performed", referred to the "[e]xecution of a regional deployment (ASIAPAC) to optimize the delivery function, driver management and dispatching of Pizza Hut through usage of the GetSwift platform".[1635] The reference in clause 1 to "ASIAPAC" meant Pizza Hut International's Asia Pacific business unit, which was responsible for markets in the Asia Pacific region.[1636] The term of engagement in cl 2 of the draft SOW was 20 January 2018 to 20 June 2021. In cross-examination, Mr Sinha agreed that the revised term of engagement reflected the fact that he was contemplating a six month trial followed by a three-year term.[1637]

[1630] Sinha Affidavit (GSW.0009.0017.0001) at [74].
[1631] Sinha Affidavit (GSW.0009.0017.0001) at [74]; GSWASIC00002544.
[1632] GSWASIC00033609 at 3610.
[1633] GSWASIC00053598 attaching GSWASIC00033422.
[1634] GSWASIC00053598.
[1635] GSWASIC00033412.
[1636] T721.40–43 (Day 10).
[1637] T721.20–30 (Day 10).

948 Clause 4 of the draft SOW, which was titled "Location for Performance of Services", stated: "Stores to be provided by Yum. Regions in scope include Hong Kong".[1638] Mr Sinha accepted that at this time, his *intention* was that Hong Kong would be the trial market in the Asia Pacific region.[1639] He also intended that a second SOW would be executed by the Middle East/North Africa business unit, which was responsible for the Kuwait market.[1640]

949 Mr Hunter forwarded Mr Sinha's email to Mr Macdonald, Mr Eagle and Mr Ozovek.[1641]

950 On 21 January 2018, Mr Eagle sent an email to Mr Hunter, Mr Macdonald, Mr Ozovek and Ms Cox responding to Mr Hunter's email on a draft SOW.[1642] Mr Eagle's response has been redacted and is subject to a claim of legal professional privilege.

951 On 22 January 2018, Mr Sinha sent an email to Ms Cox attaching a further draft of the SOW.[1643] Mr Sinha noted that while they were working to identify the potential test markets, they were simultaneously working on the SOWs to establish the legal protocol in terms of how GetSwift would be adopted and rolled out if the trial was successful. The SOW were drafted so that the relevant regional business units could adopt the SOW.[1644] Mr Sinha stated that while he intended the second market to be in Asia Pacific, potentially Hong Kong, he was unable to find a market within Asia Pacific that was willing to trial GetSwift's platform and had not managed to convince the Hong Kong franchisees to undertake the trial.[1645] Mr Sinha explained that Pizza Hut International was not able to confirm a second market to conduct a pilot of the GetSwift Platform.[1646]

952 On 23 January 2018, Mr Sinha sent a further email to Mr Hunter confirming that GetSwift was going to receive two SOWs for signing, one for Middle East Turkey Africa (**META**) and one for ASIA-PAC.[1647] Later that day, Mr Sinha sent an email to Mr Hunter stating:

[1638] GSWASIC00033412 at 3418.
[1639] T722.23–27 (Day 10).
[1640] T720.25–29 (Day 10).
[1641] GSWASIC00060925 attaching GSWASIC00033267.
[1642] GSWASIC00052204_R.
[1643] GSWASIC00053586 attaching GSWASIC00033267.
[1644] T721.7–14 (Day 10); T721.32–35 (Day 10); T726.19–29 (Day 10).
[1645] T721.45–722.2 (Day 10); T724.21–31 (Day 10).
[1646] T719.1–2 (Day 10).
[1647] GSWASIC00053568; T723.9–28 (Day 10).

> I had a good chat with Hudson and while we work to get the SOW signed between META/GS and ASIAPAC/GSW wanted to discuss the possibility of sending Brian to Kuwait to complete the discovery. I would feel lot more in having a meaningful discovery process before contractually agreeing to 300 requirements that are referenced by the Kouts team.[1648]

953 In cross-examination, Mr Sinha agreed that the documents he planned to send through to Mr Hunter were final SOWs for the ASIAPAC and META business units, which would be signed by GetSwift and the relevant officers for each business unit.[1649] By that stage, Mr Sinha had decided that the trials of the GetSwift software would take place in markets for which those business units were responsible.[1650] One of the markets in which Mr Sinha intended that trial would take place was Hong Kong.[1651]

954 In February 2018, Mr Aiken of GetSwift travelled to Kuwait to gather the pilot and roadmap requirements.[1652] The Kout team subsequently trialled the GetSwift product in one store in 2018, and was intending on expanding it to six to eight stores in Kuwait.[1653] This test was a result of a direct agreement between Kout and GetSwift, which was not subject to the terms and conditions of the Yum MSA.[1654]

955 Mr Sinha noted that Hong Kong did not show interest in the GetSwift product after GetSwift did a demonstration.[1655] The SOWs were never executed nor has any paid services been provided by GetSwift to Yum.[1656] This was owing to the fact that Yum decided to put its relationship with GetSwift on hold in the light of negative press coverage about GetSwift and subsequent litigation beginning in January 2018.[1657]

G.1.14 *Amazon Corporate LLC*

956 Amazon.com, Inc (**Amazon**) is an American company that was founded in 1994. It is a publicly traded company listed on the NASDAQ stock exchange, under the stock exchange code

[1648] GSWASIC00053537.
[1649] T723.35–40 (Day 10).
[1650] T723.42–47 (Day 10).
[1651] T724.44–46 (Day 10).
[1652] GSWASIC00060718; GSWASIC00000738.
[1653] Sinha Affidavit (GSW.0009.0017.0001) at [83].
[1654] Sinha Affidavit (GSW.0009.0017.0001) at [83].
[1655] T687.33–35 (Day 10).
[1656] Sinha Affidavit (GSW.0009.0017.0001) at [79], and [84].
[1657] T725.39–44 (Day 10).

"AMZN".[1658] It has various business focuses, including e-commerce, and is widely known as the world's largest online marketplace with a very large number of deliveries initiated through its e-commerce platforms.[1659]

Initial contact between GetSwift and Amazon

957 On 11 July 2017, Ms Mariza Hardin, a Business Development and Marketing Lead from Amazon, initiated contact with GetSwift.[1660] In initiating those dealings, it was thought by Amazon (in particular, by Ms Hardin) that the GetSwift platform could be something that could be used by Amazon in its business operations.[1661]

958 On 25 July 2017, Mr Macdonald, Mr Hunter and Ms Hardin had a phone call with other Amazon representatives to discuss the provision of GetSwift's delivery management software and services to Amazon and entry into a commercial agreement.[1662]

959 On 1 August 2017, Ms Hardin sent an email to Mr Hunter and Mr Macdonald attaching a draft Nondisclosure Agreement for GetSwift to review and sign. The Nondisclosure Agreement executed by GetSwift was returned to Ms Hardin by Mr Macdonald on 8 August 2017.[1663] That same day, Mr Hunter sent an email to Mr Eagle (copied to Mr Macdonald), attaching the non-disclosure agreement.[1664]

Trial Hosted Services Agreement

960 On 10 August 2017, Mr Macdonald and Mr Hunter provided Ms Hardin, Amanda Ebbert (a program manager at Amazon) and Severine Pinto (of Amazon) a demonstration of GetSwift's delivery management software and services. Following the demonstration, Ms Hardin sent Mr Macdonald and Mr Hunter an email attaching a draft of the Amazon Trial Hosted Services

[1658] Affidavit of Mariza Hardin sworn 5 September 2019 Hardin Affidavit (GSW.0009.0027.0001_R) at [4].
[1659] T739.33–740.19 (Day 11).
[1660] Hardin Affidavit (GSW.0009.0027.0001_R) at [7]; T740.21–26 (Day 11).
[1661] T740.37–43 (Day 11).
[1662] Hardin Affidavit (GSW.0009.0027.0001_R) at [7].
[1663] Hardin Affidavit (GSW.0009.0027.0001_R) at [8]: GSWASIC00031828_R.
[1664] GSWASIC00031828_R.

Agreement (**THSA**) for their review so that Amazon could undertake some initial testing of the GetSwift delivery management software and services.[1665]

961 On 14 August 2017, Mr Hunter replied to Ms Hardin (copied to Mr Macdonald) attaching "red lined changes as per our legal team" to the THSA.[1666] On 15 August 2017, Ms Hardin replied to Mr Hunter and Mr Macdonald, attaching further amendments to the THSA.[1667]

962 On 16 August 2017, Mr Hunter forwarded Ms Hardin's email to Mr Eagle and Mr Macdonald attaching a draft document marked up with changes from Amazon and stating: "FYI – they move fast!"[1668] Mr Eagle and Mr Hunter's email exchanges have been redacted and are subject to a claim for legal professional privilege by GetSwift.

963 On 18 August 2017, Ms Hardin sent an email to Mr Macdonald and Mr Hunter attaching a final version of the THSA for GetSwift to execute.[1669] On the same day, Mr Macdonald sent an email to Ms Hardin attaching an executed counterpart of the THSA,[1670] and on 21 August 2017, Ms Hardin sent Mr Macdonald (copied to Mr Hunter) a copy of the executed counterpart.[1671] At this time, Amazon commenced initial testing.[1672]

Pilot and Negotiation of the Amazon MSA

964 On 25 August 2017, Ms Hardin participated in a phone call with Mr Macdonald, Mr Hunter and Mr Ozovek.[1673] A contemporaneous note of the teleconference records that Ms Hardin, Ms Amanda Ebbert,[1674] and Ms Deanna Vo were on the call for Amazon.[1675] On the call, they discussed the possibility of establishing an "enterprise account" with GetSwift for the purpose of conducting a pilot test of GetSwift's platform following the conclusion of the initial testing.[1676] There was also some detailed discussion as to features of GetSwift's platform which

[1665] GSWASIC00014164 attaching GSWASIC00014165; Hardin Affidavit (GSW.0009.0027.0001_R) at [9].
[1666] GSWASIC00031780_R at 1783.
[1667] GSWASIC00031780_R at 1782.
[1668] GSWASIC00031780_R at 1782.
[1669] GSWASIC00013058; Hardin Affidavit (GSW.0009.0027.0001_R) at [10].
[1670] GSWASIC00013058 at 3059.
[1671] GSWASIC00013058 attaching GSWASIC00028576.
[1672] Hardin Affidavit (GSW.0009.0027.0001_R) at [14]; T743.1–2 (Day 11).
[1673] Hardin Affidavit (GSW.0009.0027.0001_R) at [15].
[1674] T743.24 (Day 11).
[1675] GSWASIC00056869.
[1676] Hardin Affidavit (GSW.0009.0027.0001_R) at [15].

Amazon was interested in and the teleconference apparently ended with Amazon stating that they were proceeding to their "next level of assessment".[1677]

965 On 30 August 2017, Ms Hardin sent an email to Mr Hunter and Mr Macdonald in which she stated:

> I have discussed with the team next steps and we are very interested in getting access to an enterprise account that can be configured to our needs for a 6-12 month pilot test.
>
> Since this will be tested in a pilot environment, our volume will not be large. It will be contained to US deliveries with an estimated 50-100 deliveries per month being tested.
>
> Given this scenario, can you provide the best pricing option you have and any other implementation or reoccurring engineering fees?[1678]

966 On 7 September 2017, Ms Hardin participated in a telephone call with Mr Hunter and Mr Macdonald. Apparently, Ms Hardin has a note of that call, but that has not been produced.[1679] Ms Hardin gave evidence when she was cross-examined that at the time of the call, she was avoiding discussing any specifics as to the scope and nature of Amazon's intentions for the use of the GetSwift platform; she would not explain what the pilot was in any detail to GetSwift; she was just looking to get information on the platform; no specifics were discussed as to the total scope of work that GetSwift would be required to do; and no specifics were discussed as to the total value of any relationship between GetSwift and Amazon.[1680]

967 Ms Hardin did inform Mr Hunter and Mr Macdonald that the pilot would be low volume as Amazon refined and tested the customer experience of its new product and services; GetSwift's services would have to comply with Amazon's information security policies prior to commencing the pilot and GetSwift would have to enter into a Master Services Agreement (**MSA**), and agree the terms of a "Service Order" with Amazon before any pilot could commence.[1681] Ms Hardin stated that the results of the initial testing were satisfactory so as to

[1677] GSWASIC00056869 at 6873; T743.31–32 (Day 11).
[1678] GSWASIC00010608 at 0610–0611.
[1679] T744.29–745.14 (Day 11).
[1680] T746.19–747.3 (Day 11).
[1681] Hardin Affidavit (GSW.0009.0027.0001_R) at [18].

make Amazon want to take that next step.[1682] Additionally, they discussed an adjustment of GetSwift's pricing structure due to the low volume of deliveries within the pilot.[1683]

968 Ms Hardin gave evidence that the MSA would contain the overarching commercial and legal terms agreed between the parties[1684] and that it was a requirement of Amazon that an executed MSA and Service Order be in place *before* a pilot could commence.[1685] In cross-examination, Ms Hardin agreed with the proposition that part of the point of undertaking the pilot, after the MSA was entered into, was so that Amazon could undertake a full assessment for potential Amazon use cases, and that the pilot was necessary before Amazon could assess properly the potential scale of any future use of the GetSwift Platform.[1686]

969 As noted above (at [967]), GetSwift was required by Amazon to undergo a security review process,[1687] before the parties could enter into a MSA.[1688] In an email on 7 September 2017, Ms Hardin stated that she wanted to "jump on the security review process as it takes some time to complete and is usually the barrier to a quick implementation".[1689] Ms Hardin accepted that Amazon's "intent was to start the pilot soon after security was completed".[1690]

970 Despite the fact that the security review process had not been completed, and no MSA had been entered into, Ms Hardin was pushing forward with the preparation of a Service Order while the security process was underway.[1691] On 12 September 2017, Ms Hardin sent an email to Mr Hunter attaching, for GetSwift's review, a draft Master Hosted Services Agreement (**Draft Amazon MSA**) between Amazon and GetSwift.[1692] The Draft Amazon MSA was in the standard form used by Amazon when dealing with IT service providers.[1693]

[1682] T743.4–8 (Day 11).
[1683] Hardin Affidavit (GSW.0009.0027.0001_R) at [18].
[1684] T751.44–45 (Day 11).
[1685] Hardin Affidavit (GSW.0009.0027.0001_R) at [19].
[1686] T751.5–11 (Day 11).
[1687] GSWASIC00031678; GSWASIC00061821; GSWASIC00061822.
[1688] T747.21–25 (Day 11).
[1689] GSWASIC00031678 at 1680.
[1690] T748.1–3 (Day 11).
[1691] T750.38–41 (Day 11).
[1692] GSWASIC00010210 attaching Draft Amazon MSA (GSWASIC00056371).
[1693] Hardin Affidavit (GSW.0009.0027.0001_R) at [19].

971 On 13 September 2017, Mr Hunter responded to Ms Hardin (copied to Mr Macdonald) confirming receipt of the Draft Amazon MSA and stating "we will review".[1694] On 14 September 2017, Mr Hunter forwarded the Draft Amazon MSA to Mr Eagle.[1695] On the same day, Mr Macdonald also forwarded the Draft Amazon MSA to Mr Eagle.[1696] Mr Macdonald's email to Mr Eagle is redacted and subject to a claim for legal professional privilege.

972 On 15 September 2017, Mr Macdonald sent an email to Mr Hunter outlining Mr Eagle's comments on the Draft Amazon MSA, which included:

> First, this is not a bad document – have seen much more aggressive from large companies (quite a few actually) … The 'f[**]k you' aggression I suspect will be around pricing and other commercial matters, rather than legal.
>
> …
>
> Strategy – these larger deals are template based to begin with, and a lot just doesn't fit very well. If we can start working in parallel on a concrete Service Order for a specific project it will help tremendously to give context for discussions with the MSA – i.e., specific, initial project and how best to roll out – my usual suggestion is to start engaging project management teams on both side and even prepare work flow documents (informal, and not anything legal) that gets buy-in from Amazon folk. This is all informal and outside the discussions on legal docs but helps tremendously as a strategy if we can get to it.[1697]

973 Later that day, Mr Macdonald sent Mr White, Mr Hunter, Mr Eagle and others a copy of the Draft Amazon MSA along with "Brett's initial comments".[1698]

974 On 18 September 2017, Ms Hardin sent an email to Mr Hunter informing him that the THSA had expired on 17 September 2017, and in order to allow time for the MSA to be finalised, Ms Hardin requested that the THSA be extended for 30 days by executing a document that she attached to her email.[1699] On the same day, Mr Macdonald replied attaching an executed copy of the document entitled "Re: Extension of Trial Web Services Agreement".[1700]

[1694] GSWASIC00010194.
[1695] GSWASIC00010032 attaching GSWASIC00061872.
[1696] GSWASIC00031674_R; GSWASIC00031666_R.
[1697] GSWASIC00031063.
[1698] GSWASIC00067506.
[1699] Hardin Affidavit (GSW.0009.0027.0001_R) at [20]; GSWASIC00009803.
[1700] Hardin Affidavit (GSW.0009.0027.0001_R) at [21]; GSWASIC00009803 attaching GSWASIC00009805.

975 On 21 September 2017, Mr Hunter sent an email to Ms Hardin (copied to Mr Macdonald), in which he provided comments on the Draft Amazon MSA.[1701] On 17 and 18 October 2017, Ms Hardin and Mr Eagle organised a time to have a telephone call to discuss the terms of the Draft Amazon MSA.[1702] On 20 October 2017, Mr Eagle confirmed with Ms Hardin that the list of issues to discuss had previously been sent to her and that the call was in relation to the drafting of the Draft Amazon MSA.[1703]

976 On 27 October 2017, Amazon and GetSwift entered into a Mutual Nondisclosure Agreement with an effective date of 11 October 2017.[1704] The Mutual Nondisclosure Agreement stated that the parties to it may receive confidential information from the other party.[1705]

977 On 14 November 2017, Ms Hardin sent an email to Mr Hunter and Mr Macdonald, noting that a brief call with the Amazon security team was scheduled for the following day, and that following this, they could then move forward with the execution of the Draft Amazon MSA and advised. She stated: "The next step would be to develop the service order (scope of work) for the pilot. I would like to get the ball rolling on this so we can have a draft for review soon after the MSA is signed."[1706]

978 On 15 November 2017, Mr Hunter responded to Ms Hardin (copied to Mr Macdonald), stating:

> In terms of the service order we are going to make this as flexible and easy for you and your team as possible (literally a one page sheet that references the MSA and encompasses any product functionality requirements/commercial terms). Therefore as soon as we have the MSA in place lets outline the exact requirements and time-frames needed.[1707]

979 On 20 November 2017, Mr Eagle sent an email to Ms Hardin and another at Amazon, in which he said:

> Quick note to check in on this one. I think we had finalised the last few points and how to address; was there anything further needed from our side? Would be great to sort out before thanksgiving and get this off our desks (well, and on to the next phase at

[1701] GSWASIC00061656.
[1702] GSWASIC00006766.
[1703] GSWASIC00006531.
[1704] GSWASIC00005763 attaching GSWASIC00005765, and GSWASIC00005768.
[1705] GSWASIC00005765.
[1706] GSWASIC00004379.
[1707] GSWASIC00004379.

least).[1708]

980 Mr Eagle forwarded this email to Messrs Hunter and Macdonald.[1709]

981 On 29 November 2017, Ms Hardin emailed Mr Hunter advising him:

> I believe our legal team has routed the MSA for signature and security requirements have been met (pending a successful December penetration test).
>
> As previously mentioned, our next step is to draft the service order for our pilot. Can you please provide your standard list of product functionality requirements and commercial terms that we can use as foundation to start drafting the service order? I can work with our operations team to review and get an initial draft sent your way.[1710]

982 Later that day, Mr Hunter responded to Ms Hardin (copied to Mr Macdonald), in which he stated that he will review the Draft Amazon MSA right away and countersign it. Moreover, Mr Hunter stated "[l]et's get the reqs in place, use our standard one page trusted client form and once that's done and documented, I can discuss any commercial terms".[1711]

983 Ms Hardin noted that at this point in time, she had not discussed any commercial terms of the Service Order with GetSwift.[1712]

984 On 1 December 2017, Ms Cheryl Fernandez, of Amazon, sent Mr Hunter a copy of the Amazon MSA executed by Amazon (**Amazon MSA**).[1713] The Amazon MSA contained the key overarching legal and commercial terms governing the parties' relationship.[1714] It also contained the maintenance and support terms, the performance standards, including service level requirements and security requirements. What remained was the execution of the Service Order, which was a pro-forma document exhibited to the MSA. As at 1 December 2017, Amazon and GetSwift had not executed a Service Order covering the specific commercial and legal terms of the Pilot,[1715] although Ms Hardin accepted that at the time the Amazon MSA

[1708] GSWASIC00061433.
[1709] GSWASIC00061433.
[1710] GSWASIC00004151.
[1711] GSWASIC00004151.
[1712] T756.1–2 (Day 11).
[1713] GSWASIC00061366 attaching GSWASIC00061368, and GSWASIC00061388.
[1714] T751.44–45 (Day 11).
[1715] Hardin Affidavit (GSW.0009.0027.0001_R) at [38].

was executed, the intention was to execute a Service Order eventually and that this was expected to occur.[1716]

985 It appears that the key detail that needed to be inputted for the purposes of that document was a more precise articulation of Amazon's requirements in relation to the use of the GetSwift platform.[1717] As to a payment amount, prior to 1 December 2017, Ms Hardin had discussed with Mr Hunter, Mr Macdonald and Mr Ozovek, the estimated payment to be made to GetSwift by Amazon for the pilot was only US$50,000, an amount that was intended to cover any development work undertaken by GetSwift in connexion with the pilot. Ms Hardin explained that Amazon had proposed US$50,000 because the anticipated volume of deliveries for the pilot was very low which would mean that if GetSwift charged the usual per delivery structure, GetSwift's costs for the development work for the platform would not be covered.[1718] But Ms Hardin did not recall that the parties ever agreed to the price of US$50,000 in a Service Order.[1719]

986 Moreover, in cross-examination, Ms Hardin stated that there were still a number of issues which needed to be addressed and agreed upon *before* any Service Order was executed, and the Pilot could commence, including "components around pricing and timelines" and "articulation of Amazon's precise requirements in relation to its potential use" of the GetSwift Platform.[1720] Further, Ms Hardin's noted that GetSwift's pricing did not align the anticipated low volume of deliveries to be made during the pilot.[1721] Amazon also required some customisation work to be undertaken, the complexity of which was unknown.[1722]

987 Later on 1 December 2017, Ms Hardin responded to an email Mr Ozovek requesting her to send specifications for the pilot, to which she did. In her reply, Ms Hardin also requested that Mr Ozovek incorporate the specifications into GetSwift's standard one page document and then Amazon could use that to draft the Service Order.[1723] During cross-examination, when Ms

[1716] T754.1–4 (Day 11).
[1717] T753.35–37 (Day 11); c.f. T752.24–26 (Day 11).
[1718] Hardin Affidavit (GSW.0009.0027.0001_R) at [38].
[1719] T753.23–28 (Day 11).
[1720] T752.24–30 (Day 11); T753.35–38 (Day 11).
[1721] T753.17–19 (Day 11).
[1722] T761.45–762.2 (Day 11).
[1723] GSWASIC00004076 attaching GSWASIC00061364.

Hardin was asked "so it's right to say, isn't it, that at the very time the MSA was being executed, the parties were diligently progressing the preparation of the Service Order; correct", Ms Hardin responded "we were moving things forward, yes".[1724]

988 It is worth noting that heading into the MSA, Amazon was unable to do an assessment of the scale of its potential use of the GetSwift platform as part of the point of doing a pilot was to do a full assessment for 'use cases', before fully integrating with its workflow.[1725]

Completion of a trial?

989 In respect of the above facts, it is important to foreshadow that there is some dispute concerning the THSA and whether this meant that Amazon had already trialled the GetSwift Platform prior to entry into the MSA. It is convenient to resolve this issue now. GetSwift's contentions appear to proceed on a mischaracterisation of the evidence relating to the "initial testing" conducted under the THSA. Indeed, GetSwift equates this "initial testing" to a "trial", without explaining why this is so.[1726]

990 Ms Hardin's evidence was that the purpose of the THSA was for Amazon to undertake "some initial testing" of GetSwift's delivery management software and services.[1727] The THSA was extended by 30 days to allow for the Amazon MSA to be finalised.[1728] Ms Hardin noted that pursuant to the THSA, Amazon was able to do some initial testing of the GetSwift Platform "as delivered" (i.e. without customisation) and Amazon became aware during their conversations with GetSwift following the initial testing that further customisations were required.[1729] After some customisation, Amazon would be able to proceed to a live Pilot.[1730]

991 As the evidence revealed, within a few days of entry into the THSA, Ms Hardin discussed with Mr Hunter, Mr Macdonald and Mr Ozovek the possibility of establishing an "enterprise account" for the purpose of "conducting a pilot test",[1731] to assess any potential future use.[1732]

[1724] T755.27–29 (Day 11).
[1725] GSWASIC00010608 at 0610; T751.1–36 (Day 11).
[1726] See GCS at [1217], [1221], [1255(b)], and [1276].
[1727] Hardin Affidavit (GSW.0009.0027.0001_R) at [9].
[1728] Hardin Affidavit (GSW.0009.0027.0001_R) at [20].
[1729] T769.31–35 (Day 11).
[1730] T770.21–23 (Day 11).
[1731] Hardin Affidavit (GSW.0009.0027.0001_R) at [15].
[1732] T751.5–11 (Day 11).

Such a "pilot test" could not occur without GetSwift entering into an MSA and agreeing with Amazon to the terms of a Service Order.[1733] The purpose of the "pilot test" was communicated to Mr Hunter and Mr Macdonald by Ms Hardin in a phone call on 7 September 2017.[1734] This evidence was undisturbed in cross-examination.[1735] And as will become evident below, Ms Hardin explained that no Service Orders were executed by Amazon or its affiliates under the Amazon MSA.[1736] This suggests that the pilot never commenced.

Preparation and release of the First Amazon Announcement

992 On 29 November 2017, at 11:24am, Mr Banson sent an email to Mr Kabega and "companies_sydney@asx.com.au" attaching a request for GetSwift's shares to be placed in a trading halt.[1737] At 11:33am on 29 November 2017, Mr Banson sent an email to Mr Hunter, Mr Macdonald and Mr Eagle confirming that the trading halt had been granted by the ASX.[1738] At 11:39am on 29 November 2017, the ASX released a market announcement entitled "Trading Halt".[1739]

993 On Friday 1 December 2017, at 6:12am, Mr Hunter sent an email to Mr Eagle, Mr Macdonald and Ms Cox, forwarding an email from Ms Fernandez of Amazon with a link to the Amazon MSA.[1740]

994 At 6:47am, Mr Hunter sent an email to Mr Eagle, Mr Macdonald, Mr Wilson and Mr Ozovek attaching the draft Amazon announcement. Mr Hunter stated:

> Due to regulatoy [*sic*] requirements we may be required to put this out today. Please review and comment. If in agreement then lets [*sic*] drop both this and Yum at market open.
>
> Please let me know ASAP and then lets [*sic*] prep Zane. Will make our conversations with all the investors rather interesting.[1741]

[1733] Hardin Affidavit (GSW.0009.0027.0001_R) at [18(d)].
[1734] Hardin Affidavit (GSW.0009.0027.0001_R) at [18(d)].
[1735] T751.5–8 (Day 11); T751.23–25 (Day 11).
[1736] Hardin Affidavit (GSW.0009.0027.0001_R) at [48].
[1737] GSW.1019.0001.0200 attaching GSW.1019.0001.0201.
[1738] GSWASIC00054054.
[1739] GSW.1001.0001.0291.
[1740] GSWASIC00061338 attaching Amazon MSA (GSWASIC00061340), and GSWASIC00061361.
[1741] GSWASIC00053989 attaching GSWASIC00034176.

995 At 8:27am, Mr Macdonald emailed Mr Eagle (copying Mr Hunter) requesting he send an email to "Cheryl [Fernandez]" at Amazon informing her that "we are going to have to file a regulatory disclosure that we signed an agreement with [Amazon]".[1742] He dictated that '[t]his needs to be sent to her by 930am [*sic*] today". [1743] Mr Macdonald's email included the text of a proposed announcement by GetSwift. Mr Macdonald and Mr Eagle then exchanged further emails about precisely who to contact at Amazon.[1744]

996 At 8:28am, Mr Macdonald sent an email to Mr Banson (copied to Mr Eagle and Mr Hunter) in which Mr Macdonald attached a copy of the First Amazon Announcement and the Yum Announcement, and stated:

> Can you please submit these two attachments asap to be released not before 945am today.
>
> These will both obviously be price sensitive![1745]

997 At 8:37am, Mr Banson replied to and stated that he will release at 9:30am "as just discussed with Brett".[1746] At 9:35am, Mr Eagle sent an email to Ms Hardin (not Ms Fernandez) informing her that GetSwift were "putting out a brief announcement to the ASX for compliance" and sent her the text of the First Amazon Announcement.[1747] At 9:36am, Mr Eagle forwarded his email to Mr Hunter and Mr Macdonald.[1748]

998 At 10:01am, the ASX released an announcement entitled "GetSwift and Amazon" and was marked as price sensitive at GetSwift's request (**First Amazon Announcement**).[1749] The full content of that announcement was as follows:

> **GetSwift Limited (ASX: GSW)** ('GetSwift' or the 'Company'), the SaaS solution company that optimises delivery logistics world-wide, is pleased to announce that it has signed a global agreement with Amazon.
>
> Due to the terms and conditions of the agreement and the highly sensitive nature, no further information will be provided by the company other than to comply with

[1742] GSWASIC00067237.
[1743] GSWASIC00067237.
[1744] GSWASIC00067237.
[1745] GSWASIC00004073 attaching GSWASIC00034171, and GSWASIC00034169.
[1746] GSW.0031.0002.3481.
[1747] GSWASIC00034167.
[1748] GSWASIC00034167.
[1749] First Amazon Announcement (GSW.1001.0001.0320); Agreed Background Facts (GSW.0002.0002.0001) at [94].

regulatory requirements for disclosure.

ASX reaction to the First Amazon Announcement

999 At 10:01am on 1 December 2017, ASX Surveillance contacted Mr Kabega, GetSwift's designated Listings Adviser within Listings Compliance of the ASX, to advise of an increase in GetSwift's share price.[1750] At no time prior to the First Amazon Announcement being submitted to the ASX was Mr Kabega notified by GetSwift of its intention to release the First Amazon Announcement.[1751]

1000 At 10:02am, Ms Hardin sent an email to Mr Eagle (copied to Mr Hunter and Mr Macdonald) in which she stated:

> **Please do not release the announcement from GetSwift.** As the MSA states in Section 5.2 Confidentiality Clause of "Supplier will not issue press releases or publicity relating to Amazon or this Agreement or reference Amazon or its Affiliates in any brochures, advertisements, client lists or promotional materials."
>
> This is very concerning to us given we were not notified of any press release for our pending agreement.
>
> Can you please send the details of the compliance requirements that you referenced and justification for the need to issue an announcement and we can further discuss how to meet your obligations.[1752]

1001 At 10:04am, Mr Banson sent an email to Mr Macdonald, Mr Eagle and Mr Hunter in which he informed them that the trading halt had been lifted and both the First Amazon Announcement and the Yum Announcement had been marked as price sensitive.[1753]

1002 Between 10:02am and 10:14am, Mr Kabega telephoned Mr Banson to obtain further information about the First Amazon Announcement. Mr Banson informed Mr Kabega that the announcement was price sensitive. Mr Kabega notified Mr Banson that the announcement did not address any of the relevant matters set out in ASX Guidance Note 8 and that ASX may suspend trading in GetSwift securities.[1754]

[1750] Kabega Affidavit (GSW.0009.0010.0001_R) at [95].
[1751] Kabega Affidavit (GSW.0009.0010.0001_R) at [95].
[1752] GSWASIC00034166 (emphasis in original); GSWASIC00052414.
[1753] GSWASIC00004065.
[1754] Kabega Affidavit (GSW.0009.0010.0001_R) at [96].

1003 At or around 10:14am, Mr Kabega and Mr Black telephoned Mr Banson. In that telephone call, it was communicated to Mr Banson that GetSwift should seek a trading halt to allow GetSwift to update the market with additional information in relation to the agreement with Amazon. Mr Banson was informed that if GetSwift did not seek a trading halt, the ASX would likely suspend GetSwift shares from quotation until such time as GetSwift provided further details in relation to the agreement with Amazon.[1755]

1004 At 10:19am, Mr Black and Mr Kabega called Mr Eagle on his mobile and asked if he was across the GetSwift announcement regarding the MSA, and Mr Eagle confirmed that he was. Mr Black stated that GetSwift would need to provide further information regarding the First Amazon Announcement as it completely lacked any details regarding the agreement and that GetSwift should request a trading halt to provide that information or the ASX may be required to suspend its securities until the market is updated. Mr Eagle told Mr Black he would need ten minutes to call the board of GetSwift.[1756]

1005 At 10:50am, the ASX notified the market that it had suspended the trading of GetSwift shares, pending the release of an announcement by GetSwift containing further details of its agreement with Amazon.[1757]

1006 Mr Kabega received a telephone call from Mr Eagle requesting an urgent meeting with the ASX to discuss the suspension of GetSwift's shares from trading and the First Amazon Announcement. A meeting was arranged between representatives of GetSwift and the ASX for later in the day at the ASX's offices on Bridge Street.[1758] At 12:20pm, Mr Eagle sent an email to Mr Hunter, Mr Macdonald and Mr Ron Halstead of Clayton Utz to arrange a conference call for 1pm that day.[1759]

[1755] Affidavit of Andrew Richard Alexander Black affirmed 4 October 2019 (**Black Affidavit**) (GSW.0009.0011.0001_R) at [110]; GSW.1019.0001.0305; Kabega Affidavit (GSW.0009.0010.0001_R) at [98].
[1756] GSW.1019.0001.0305; Kabega Affidavit (GSW.0009.0010.0001_R) at [99]; Black Affidavit (GSW.0009.0011.0001_R) at [111].
[1757] GSW.1001.0001.0322; Agreed Background Facts (GSW.0002.0002.0001) at [95]; Kabega Affidavit (GSW.0009.0010.0001_R) at [100]–[101]; Black Affidavit (GSW.0009.0011.0001_R) at [113].
[1758] Kabega Affidavit (GSW.0009.0010.0001_R at 0021_R) at [102].
[1759] BHTB003.

Updated draft of proposed Service Order provided to Amazon

1007 At 12:45pm on 1 December 2017, Mr Ozovek sent Ms Hardin an email attaching a draft of the Service Order and the Process Flow document.[1760] As to this document, Ms Hardin agreed that, as of 1 December 2017, "the parties were continuing to cooperatively progress the preparation of a Service Order at this time" and agreed that this "continued throughout December and into January".[1761]

Preparation and release of the Second Amazon Announcement

1008 At 2:59pm on 1 December 2017, Mr Eagle sent an updated draft of the Second Amazon Announcement to Mr Kiki of Aesir Capital, corporate advisor and as "Sole Lead Manager" in the Second Capital Raising.[1762] For context, GetSwift appointed Aesir Capital as its corporate advisor and as "Sole Lead Manager" in the Second Capital Raising.[1763] Aesir Capital produced a report in December 2017, which I will refer to in subsequent sections (**Aesir Capital Report**).

1009 At or about 4pm, a meeting took place between Mr Black, Mr Kabega, Mr Kevin Lewis and Mr David Barnett of the ASX, and Mr Eagle, Mr Hunter, Mr Macdonald of GetSwift and GetSwift's legal representative, Mr Ron Halstead from Clayton Utz.[1764] At the meeting, Mr Lewis told GetSwift representatives that the First Amazon Announcement did not include sufficient information about the nature of the agreement that GetSwift had entered into with Amazon and that GetSwift was required to lodge an update with further details to the satisfaction of the ASX before the suspension was lifted.[1765] Mr Lewis also stated that the nature of the additional information that the ASX expected to receive included the potential financial impact on GetSwift's revenue and profit resulting from the Amazon MSA.

1010 Mr Eagle and Mr Hunter said that there was limited information the company could provide to the market concerning the potential financial impact on GetSwift's revenue and profit as such

[1760] GSWASIC00004058 attaching GSWASIC00061331, and GSWASIC00061330.
[1761] T756.22–25 (Day 11).
[1762] GSWASIC00053984 attaching GSWASIC00052516.
[1763] GSW.0013.0001.0720; GSWASIC00033949 at 3950; Affidavit of Maroun Younes affirmed 6 September 2019 (**Younes Affidavit**) (GSW.0009.0028.0001_R) at [28]; Affidavit of Tim Hall affirmed 16 September 2019 (**Hall Affidavit**) (GSW.0009.0040.0001_R) at [10].
[1764] Black Affidavit (GSW.0009.0011.0001_R) at [114].
[1765] Black Affidavit (GSW.0009.0011.0001_R) at [115].

details were not sufficiently advanced or known at that stage. At the conclusion of the meeting, Mr Eagle and Mr Halstead said that they would draft a further announcement in relation to the Amazon agreement.[1766] The meeting went for approximately 30 to 45 minutes.[1767]

1011 At 5:32pm, Mr Eagle sent an email to Mr Black, Mr Kabega and Mr Lewis attaching a draft announcement entitled "GetSwift Update on Amazon".[1768] At 5:33pm, Mr Eagle forwarded his 5:32pm email to the ASX to Mr Hunter and Mr Macdonald.[1769] At 5:45pm, Mr Black responded to Mr Eagle's email and stated that, as discussed in the meeting that afternoon, the ASX expected the amended announcement to make clear that the number of deliveries the agreement may generate was currently unknown and that the paragraph about confidentiality obligations needed to be amended to remove the implication that there were material terms that were not being disclosed.[1770]At 5:55pm, Mr Eagle sent a further email attaching a revised draft of the announcement, which stated:

> The extent of the services to be provided and the revenues to be derived will be generated from specific transactions agreed with Amazon pursuant to the Master Services Agreement. Due to the terms of the agreement the number of deliveries this agreement may generate is currently not determinable[1771]

1012 At 5:59pm, Mr Halstead of Clayton Utz sent an email to Mr Eagle in which he said:

> My review of the agreement is that most of its provisions are generic and that the only additional matter you should consider disclosing is the Term in clause 10, subject to any clearance by Amazon.
>
> The disclosure could be as follows "the contract is for a base term of 12 months subject to amazon rights of termination at any time".[1772]

[1766] Black Affidavit (GSW.0009.0011.0001_R) at [115]; Kabega Affidavit (GSW.0009.0010.0001_R) at [103]–[105]; GSW.1019.0001.0311.
[1767] Black Affidavit (GSW.0009.0011.0001_R at 0025) at [114]; Kabega Affidavit (GSW.0009.0010.0001_R) at [103], and [105].
[1768] GSW.1019.0001.0202 attaching GSW.1019.0001.0203; Black Affidavit (GSW.0009.0011.0001_R) at [116]; Kabega Affidavit (GSW.0009.0010.0001_R) at [107].
[1769] GSWASIC00034153 attaching GSWASIC00053968.
[1770] GSW.1019.0001.0205; Black Affidavit (GSW.0009.0011.0001_R) at [117]; Kabega Affidavit (GSW.0009.0010.0001_R) at [109].
[1771] GSW.1003.0001.0015 attaching GSW.1003.0001.0016; Black Affidavit (GSW.0009.0011.0001_R) at [118]; Kabega Affidavit (GSW.0009.0010.0001_R) at [110].
[1772] GSWASIC00052507.

1013 At 6:02pm, Mr Eagle responded to Mr Halstead, "yes ahead of you on that one".[1773] At 6:02pm, Mr Black sent an email to Mr Eagle stating that "ASX has no further comments on the draft announcement", approving the revised draft version of the announcement for submission via ASX Online.[1774] At 6:05pm, Mr Eagle sent the Second Amazon Announcement to Mr Banson and stated "please lodge asap".[1775]

1014 At 6:15pm, the ASX released an announcement entitled "GetSwift – Update on Amazon" (**Second Amazon Announcement**).[1776] The Second Amazon Announcement stated that:

> At the request of ASX, ('GetSwift' or the 'Company'), the SaaS solution company that optimises delivery logistics world-wide, provides the following update to its ASX announcement dated 1 December 2017.
>
> GetSwift is pleased to announce that it has signed a global master agreement with Amazon.
>
> The extent of the services to be provided and the revenues to be derived will be generated from specific transactions agreed with Amazon pursuant to the Amazon Master Services Agreement. Due to the terms of the agreement the number of deliveries the agreement may generate is currently not determinable.[1777]

1015 The Second Amazon Announcement did not include any statement about the term of the Amazon MSA being for one year. Ms Hardin could not recall one way or the other if she saw the Second Amazon Announcement at the time.[1778]

1016 At 6:32pm, the ASX announced that GetSwift securities had been reinstated to official quotation.[1779] At 6:54pm, Mr Banson sent an email to Mr Eagle, Mr Macdonald and Mr Hunter informing them that the Second Amazon Announcement had been released.[1780]

[1773] GSWASIC00052507.
[1774] GSW.1019.0001.0209; Black Affidavit (GSW.0009.0011.0001_R) at [119]; Kabega Affidavit (GSW.0009.0010.0001_R) at [111].
[1775] GSW.0031.0003.6835 attaching GSW.0031.0003.6837.
[1776] Second Amazon Announcement (GSW.1001.0001.0323); Agreed Background Facts (GSW.0002.0002.0001) at [96].
[1777] Second Amazon Announcement (GSW.1001.0001.0323).
[1778] T756.36–757.43 (Day 11).
[1779] GSW.1001.0001.0325; Agreed Background Facts (GSW.0002.0002.0001) at [97].
[1780] GSWASIC00034139.

1017 Mr Macdonald sent an email to Mr Hunter and Mr Eagle regarding Ms Hardin's request not to release the First Amazon Announcement.[1781] Mr Macdonald's email is redacted for privilege.

Amazon's reaction to the Second Amazon Announcement

1018 On 2 December 2017, at 3:18am, Ms Hardin sent an email to Mr Eagle, Mr Hunter and Mr Macdonald in which she stated:

> We were surprised and disappointed by GetSwift's unauthorised, unnecessary and misleading disclosure to ASX regarding the closing of the Master Hosted Services Agreement ("Agreement"). This disclosure expressly violates the terms of the Agreement, specifically Section 5.2, and contravenes our explicit requests concerning the proposed disclosure, all without explanation. Beyond breaching the Agreement, this was a breach of our trust. As such, we are reevaluating our relationship with GetSwift and are exploring all available options.[1782]

1019 At 6:15am, Mr Eagle responded to Ms Hardin in the following terms:

> Both ASX Listing Rules and the Corporations Act requires us to disclose immediately when we have entered into a material agreement. What we worked hard to achieve was to disclose only the fact that the MSA had been signed and not to disclose any detail about it. There was no press release, nor advertising or any other sort of promotional material.
>
> Unfortunately ASX determined immediately that we must disclose the material terms of the MSA and when we pushed back on that, they suspended our trading on the exchange. This is a very serious issue for companies and it took us the entire day to manage it. We had to call in favours with government ministers to call the ASX and put pressure on them; we also had some of our larger institutional shareholders (including a $100b fund) also call the ASX to complain on our behalf.
>
> We then set up a face to face meeting, with all of the GetSwift directors sitting down with the ASX compliance personnel - including the most senior person there who had actually written the ASX Guidance Note on the disclosure obligations. … All this in particular was instrumental in pushing back hard on the requirements ASX were insisting upon, and after a long, terse exchange we were able to get their agreement to the updated release that was then subsequently put out - again with absolute bare minimum that would allow us to be put back into normal trading status.[1783]

1020 At 6:35am, Mr Hunter sent an email to Ms Hardin stating:

> If I can just add my direct 2c here . I instructed every single person not to disclose anything regarding our project, not comment or engage in any form with any PR or press. Furthermore to be blunt when push came to shove I was prepared to dissolve

[1781] GSWASIC00052414.
[1782] GSWASIC00053959.
[1783] GSWASIC00053959.

> and delist the company rather than violate any confidential information. How serious? After being told we needed to disclose details, in front of the ASX regulators I said on record "then the company is dead and we are shutting down". In addition as Brett said I reached out to the top level of the Australian government.
>
> So we would never ever breach our trust or confidentiality regardless of the cost. Never. We effectively told them nothing. I hope you realize just how firm and focused we have been on this.[1784]

1021 At 6:32am, Mr Macdonald sent an email to Mr Hunter in which he stated "Good! We must address her initial PR misunderstanding vs our regulatory Compliance".[1785]

1022 On 12 December 2017, Mr Hunter forwarded two emails to Mr Eagle. The first was an email dated 30 November 2017 from Mr Ozovek to Ms Hardin, copied to Mr Macdonald and Mr Hunter with attachments.[1786] The second was Mr Macdonald's redacted email from 1 December 2017.[1787]

Amazon aware, or agreed to, the making of a regulatory announcement

1023 GetSwift submits that there may be an issue as to whether Amazon was made aware of, and agreed to, the making of a regulatory announcement concerning the fact of the entry into a relationship. It says that it is not clear what the relevance of this is and that it would seem irrelevant. However, to the extent it may be relevant, GetSwift says that a finding should be made that this did in fact occur on or about 23 October 2017.[1788]

1024 In this regard, GetSwift relies on the fact that in his email response to Ms Hardin's initial expression of concern, on 2 December 2017, Mr Eagle stated:

> We had discussed back in October if you recall the need for us as an ASX company to comply with our disclosure obligations and that this was one of the points you and Rebecca agreed with me on our call; with your suggestion that it should be addressed in the NDA.[1789]

1025 Ms Hardin never responded to this email disputing this statement.[1790] Notwithstanding this, when it was suggested to Ms Hardin that if the above statement was false in her mind at the

[1784] GSWASIC00053959.
[1785] GSWASIC00032643.
[1786] GSWASIC00003786.
[1787] GSWASIC00052414.
[1788] GCS at [1239].
[1789] GSWASIC00032647.
[1790] T758.41–45 (Day 11).

time she received the email, she would likely have replied disputing what he said in his email, Ms Hardin was clear: "No. I don't accept that".[1791] Ms Hardin was unable to recollect whether or not she had any discussions at all with Mr Eagle in relation to the parties' arrangements in October 2017, and accepted she could not remember one way or the other whether Mr Eagle might have told her about the need for a regulatory disclosure.[1792]

1026 As to the contemporaneous documents, in an email from Ms Hardin of 23 October 2017, she recorded "[w]e just had a good call with Brett to discuss outstanding items for the MSA".[1793] Also on 23 October 2017, Mr Eagle sent an email to Mr Hunter and Mr Macdonald providing an update of his call with Amazon in which he recorded "they were not willing to budge on the MSA but they agreed to the regulatory disclosure requirement and have a revised draft of the NDA to send through".[1794] Clause 5 of the NDA permitted disclosure to comply with regulatory requirements provided advance notice was given.[1795]

1027 ASIC submits Amazon and Ms Hardin did not agree to the making of a regulatory announcement concerning the fact of the entry into a relationship. ASIC says that Ms Hardin's evidence was that she was not aware that once the Amazon MSA was executed, GetSwift proposed to make a public announcement for ASX compliance in relation to the MSA, nor was she aware of any disclosure obligations of GetSwift in relation to the MSA,[1796] and her contemporaneous email communications with GetSwift upon becoming aware of the First Amazon Announcement are entirely consistent with her evidence in this regard.[1797]

1028 While I would incline to accept ASIC's position, resolving this issue as immaterial. As the evidence reveals, a meeting was arranged to discuss this issue. That meeting took place on 19 December 2017,[1798] during which Ms Hardin participated in a phone call with Mr Eagle, Mr Hunter and Mr Macdonald from GetSwift as well as Ms Rebecca Lactot and Ms Christine Henningsgaard from Amazon. Ms Hardin deposed that the following took place at the meeting:

[1791] T759.1–3 (Day 11).
[1792] T759.14–28 (Day 11).
[1793] GSWASIC00055199. See also GSWASIC00006766; GSWASIC00006531.
[1794] GSWASIC00067285.
[1795] GSWASIC00034167.
[1796] Hardin Affidavit (GSW.0009.0027.0001_R) at [33].
[1797] GSWASIC00052414; GSWASIC00034166, and GSWASIC00053959.
[1798] T759.26–34 (Day 11).

she requested an explanation for why such a disclosure would be required given that the Service Order had not been fully negotiated and the expected value of the Service Order was not material; Mr Eagle, Mr Hunter and Mr Macdonald stated that their disclosure of the execution of the MSA was due to GetSwift's continuous disclosure obligation to the ASX, that they had engaged solicitors, Clayton Utz, to review whether the execution of the MSA required such disclosure, and Clayton Utz had concluded that a disclosure was required; and Mr Eagle, Mr Hunter and Mr Macdonald said that GetSwift agreed to make no further disclosures concerning its relationship with Amazon without first granting Amazon an opportunity to review.[1799]

Continued preparation of Service Order and Service Order never entered into

1029 On 8 December 2017, Mr Ozovek sent a report prepared by an external internet security firm as to its testing of GetSwift's systems to Ms Hardin.[1800] The report indicated no threats present in any of the areas tested.[1801] On 12 December 2017, GetSwift completed the "penetration test" of GetSwift's network and security infrastructure.[1802]

1030 Within hours of the meeting on 19 December 2017, Ms Hardin emailed seeking to progress the preparation of the Service Order.[1803] She was continuing to "move business forward".[1804] The progression of the Service Order continued, with Ms Hardin arranging a teleconference with Mr Ozovek which took place on 22 December 2017 to discuss Amazon product requirements that would be included in the Service Order.[1805] Following that teleconference, there were continued email communications between Ms Hardin and Mr Ozovek working through Amazon's specific needs for the purposes of preparing a Service Order.[1806] Throughout December 2017 and January 2018, GetSwift and Amazon worked "cooperatively" to progress the preparation of a Service Order.[1807]

[1799] Hardin Affidavit (GSW.0009.0027.0001_R) at [40].
[1800] GSWASIC00032634 attaching GSWASIC00053762.
[1801] GSWASIC00053762.
[1802] GSWASIC00032634 attaching GSWASIC00053762.
[1803] GSWASIC00003577.
[1804] T760.20–761.1 (Day 11).
[1805] Hardin Affidavit (GSW.0009.0027.0001_R) at [43].
[1806] T762.38–764.9 (Day 11); GSWASIC00032585.
[1807] T756.22–25 (Day 11).

1031 On 19 January 2018, Ms Hardin sent an email indicating that a Service Order had been drafted and seeking to arrange a call with various participants "to make sure we address all issues needed to get a complete Service Order sent to you as soon as possible".[1808]

1032 However, on 2 February 2018, Ms Hardin indicated that Amazon was re-evaluating its plans to use the GetSwift platform.[1809] That was the first time that Amazon had intimated it would not be proceeding with a Service Order.[1810] During crThed reasons for this decision were not explored.[1811] When counsel for ASI C was questioned as to the relevance of this issue, Mr Halley responded: "The only relevance is … to complete the story."[1812]

1033 For those who have read this far, this might seem a compelling reason to enquire further. Nevertheless, the reasons for Amazon's decision were not explored as they were accepted as irrelevant to the issues in the proceeding.[1813] A Service Order was never executed.[1814] No Service Orders had been executed by Amazon or its affiliates under the Amazon MSA.[1815]

G.1.15 *The Second Placement*

Trading Halt

1034 On 6 December 2017, Mr Banson sent an email to Mr Hunter, Mr Macdonald and Mr Eagle attaching a draft trading halt for their "review and approval".[1816]

1035 On 7 December 2017, at 7:12am, Mr Hunter sent an email to Mr Macdonald, Mr Eagle, Mr Banson and Ms Nevash Pillay, Advisory Board Member of GetSwift, in which he stated:

> Let's make sure we put out a trading halt pending a capital raise today before market opens. We should resume trading next Monday . Brett please confirm .[1817]

[1808] GSWASIC00032584; T766.15–21 (Day 11).
[1809] GSWASIC00032569.
[1810] T768.12–17 (Day 11).
[1811] T771.8–772.14 (Day 11).
[1812] T771.25 (Day 11).
[1813] T771.8–772.14 (Day 11).
[1814] Hardin Affidavit (GSW.0009.0027.0001_R) at [46], [41]–[45]: GSWASIC00032643; GSWASIC00003786; GSWASIC00003577; GSWASIC00032584.
[1815] Hardin Affidavit (GSW.0009.0027.0001_R) at [48].
[1816] GSW.0031.0001.6937 attaching GSW.0031.0001.6938.
[1817] GSW.0031.0001.7066.

1036 At 8:04am, Mr Polites sent an email to Mr Hunter and Mr Macdonald regarding an article published in the AFR in relation to GetSwift's proposed capital raise. In this email, Mr Polites stated:

> FYI, StreetTalk last night published a story regarding your $100m raise. http://www.afr.com/street-talk/market-darling-getswift-launches-equity-raise- 20171 206-h0050j
>
> It appears someone within your camp is leaking, and perhaps forcing your hand here.
>
> Can you please confirm your plans, and we'll plan a media approach accordingly. This story doesn't change our approach, but it may pique journos interests and put pressure on us ahead of the news.
>
> Assuming you are going into halt today, our approach is as follows:
>
> - Prepare media release to compliment ASX announcement
> - Prepare media Q&A in a bid to avoid interview (and further questions regarding Amazon)
> - Distribute media release the second the announcement about the raise close hits the ASX
>
> We can't afford to skip ahead of the ASX here in terms of our announcement, given you are already firmly in the Exchange's gaze. We don't want to risk a query or speeding ticket.[1818]

1037 At 8:05am, Mr Banson sent an email to the email address "Companies_Sydney@asx.com.au" (copied to Mr Kabega) attaching a request for GetSwift's shares to be placed in a trading halt.[1819] At 8:05am, Mr Macdonald sent an email to Mr Polites (copied to Mr Hunter) in which he stated, "Going into a trading halt this morning before market opens".[1820]

1038 At 8:36am, the ASX released to the market an announcement entitled "Trading Halt" (**Second Placement Trading Halt Announcement**). [1821] The Second Placement Trading Halt Announcement stated that GetSwift "requests a trading halt in relation to a proposed capital raising".

[1818] GSW.0027.0001.2243.
[1819] GSW.0031.0002.6711.
[1820] GSW.0027.0001.2243.
[1821] Second Placement Trading Halt Announcement (GSW.1001.0001.0336).

1039 At 9:11am, Mr David Halliday of Aesir Capital sent an email to various investors regarding GetSwift's proposed capital raise.[1822] Attached to Mr Halliday's email was a draft term sheet and an investor presentation. In this email, Mr Halliday stated:

> GetSwift Ltd (ASX Code: GSW) has appointed Aesir Capital as Sole Lead Manager to raise $75 Million at $4.00/share. The company will consider oversubscriptions.
>
> Please find attached the term sheet, company presentation, and Aesir research. The timetable for the transaction is as follows:
>
> **Indicative Timetable**
>
> Event Date
>
> Institutional/Sophisticated book build commences Thursday 7th December 2017
>
> Firm and irrevocable bids due Thursday 7th December 2017 by 5pm AEDST Offer letters dispatched Friday 8th December 2017
>
> Signed offer letters returned Friday 8th December 2017 by 4pm AEDST
>
> Announcement of Placement to ASX Monday 11th December 2017
>
> Proposed DVP Settlement Monday 18th December 2017
>
> **FINAL FIRM BIDS DUE: Thursday 7TH DECEMBER 2017 AT 5PM AEDST**
>
> Please do not hesitate to contact us if you have any queries or wish to submit a bid.
>
> Disclosure: Aesir Capital and/or its advisers hold shares in GetSwift and may participate in this placement.[1823]

1040 At 9:59am, Mr Banson sent an email to Messrs Hunter, Macdonald and Eagle and Ms Pillay in which he stated, "[GetSwift] has been granted a trading halt".[1824]

Second Placement Completion Announcement

1041 On 8 December 2017, at 11:03am, Mr Kabega sent an email to Mr Banson and Mr Hains (copied to Mr Eagle) in which he stated:

> Just letting you know in advance, that the announcement which is proposed to be made by the Company to lift the trading halt if the issuer has raised funds by issuing securities should include the information detailed under listing rule 3.10.3.
>
> The announcement will need to clarify what component of the capital raising is being

[1822] GSW.0013.0001.0544 attaching GSW.0013.0001.0568.
[1823] GSW.0013.0001.0544 (emphasis in original).
[1824] GSW.0031.0002.6711.

issued under 7.1 capacity.

ASX understands that the Company is issuing convertible notes as part of the proposed raising. Please note that the announcement will need to include the material terms of the convertible notes and also clarify that conversion of the notes is subject to shareholder approval.[1825]

1042 At 4:48pm, Mr Kiki, Partner at Aesir Capital, sent an email to Mr Macdonald, Mr Hunter and Mr Eagle (copied to Mr Damian Black and Mr Halliday, both of Aesir Capital) attaching a draft ASX announcement regarding GetSwift's proposed capital raise,[1826] which stated:

GetSwift Limited (ASX:GSW) ('GetSwift' or the 'Company') is pleased to announce that it has completed a successful capital raising of A$80m that includes strong support from existing institutional shareholders as well as new Australian and USA institutional investors.

…

The company will issue 20,000,000 shares at A$4.00 per share in a single tranche equity placement using the Company's existing placement capacity under ASX Listing Rule 7.1.[1827]

1043 At 4:48pm, Mr Hunter sent an email to Mr Kiki attaching an updated announcement concerning GetSwift's proposed capital raise. In this email, Mr Hunter stated:

Please review - I have fine tuned it to indicate the USD$40 we declined and to indicate support for our current register & value of the stock.[1828]

1044 At 7:11pm, Mr Hunter sent an email to Mr Kiki (copied to Mr Macdonald, Mr Eagle, Mr Black and Mr Halliday) in relation to the announcement concerning GetSwift's proposed capital raise.[1829] In this email, Mr Hunter stated:

If all ok with this then we should flick a copy to Harry (PR) and Zane for release on Monday on the ASX.

Joel if you approve then pass it on to Harry

Brett if you are ok pass it on to Zane w appropriate instructions for Monday.[1830]

[1825] GSWASIC00003960.
[1826] GSWASIC00003943 attaching GSWASIC00033955.
[1827] GSWASIC00033955 (emphasis in original).
[1828] GSWASIC00003923.
[1829] GSWASIC00053781.
[1830] GSWASIC00053781.

1045 At 11:36pm, Mr Kiki sent a further email to Messrs Macdonald, Hunter and Eagle (copied to Mr Black and Mr Halliday) attaching an updated draft ASX announcement regarding GetSwift's proposed capital raise.[1831]

1046 On 9 December 2017, Mr Hunter sent an email to Mr Macdonald, Mr Banson and Mr Eagle (copied to Mr Kiki) regarding the draft announcement concerning GetSwift's proposed capital raise. In this email, Mr Hunter stated:

> Let's make sure we lodge it no later than 9am so it's released by 915am. Brett can you provide Zane the approved version please indicating the 75$m raise and $50 m that was declined? Trading resumes at 10am.[1832]

1047 On 10 December 2017, Mr Hunter sent a further email to Mr Macdonald, Mr Banson and Mr Eagle (copied to Mr Kiki) in which he stated:

> Just looked over the term sheets - we had a verbal for $50m and received a written one for $40m USD and a number of other ones as well to tally up to $50m . Can you just make the change in the ASX release to say a USD $40m strategic instead of $50 please. Easier and documented.[1833]

1048 On 11 December 2017, at 8:19am, Mr Eagle sent an email to Mr Banson (copied to Messrs Hunter and Macdonald) attaching an updated draft announcement concerning GetSwift's proposed capital raise.[1834] Mr Eagle directed Mr Banson to "file this announcement today too".[1835]

1049 At 9:03am, GetSwift submitted to the ASX and, at 9:53am, the ASX released to the market an announcement entitled "GetSwift Completes Over-Subscribed A$75m Institutional Placement to Accelerate Growth" (**Second Placement Completion Announcement**).[1836] The Second Placement Completion Announcement stated that GetSwift: (1) had completed a successful capital raising of A$75m that included strong support from existing institutional shareholders as well as new Australian and USA institutional investors; and (2) would issue 18,750,000

[1831] GSWASIC00003923 attaching GSWASIC00033949.
[1832] GSWASIC00003893.
[1833] GSWASIC00003892.
[1834] GSWASIC00003892 attaching GSWASIC00003896.
[1835] GSWASIC00003892.
[1836] GSW.1001.0001.0338.

shares at A$4.00 per share in a single tranche equity placement using the Company's existing placement capacity under ASX Listing Rule 7.1.[1837]

Second Placement Cleansing Notice

1050 On 19 December 2017, at 4:16pm, Mr Banson sent an email to Mr Eagle requesting confirmation to proceed with the allotment of shares for GetSwift's placement.[1838] Mr Eagle responded requesting that Mr Banson prepare an Appendix 3B and cleaning notice. In this email, Mr Eagle stated: "Yes prepare and circulate a draft for review; include the issuances to the 4 parties that funded directly to us based on the numbers from the earlier email".[1839]

1051 At 5pm, Mr Banson sent a further email to Mr Eagle attaching a draft Appendix 3B and cleansing notice.[1840] In this email, Mr Banson stated:

> Attached is the 3B and cleansing notice for your review and approval in the first instance. Do note, they'll be combined and lodged as one document.
>
> Will you distribute to the board?[1841]

1052 At 5:12pm, Mr Eagle sent an email to Mr Macdonald, Mr Hunter and Ms Pillay, attaching a draft Appendix 3B and cleansing notice for their review, stating that he would "forward to the board for us all to review".[1842]

1053 On 22 December 2017, GetSwift issued 18,774,427 shares at $4.00 per share to raise $75,097,708. At 8:23am that day, GetSwift submitted to the ASX and, at 8:33am, the ASX released to the market an announcement entitled "*Notice Under Section 708A(5) of the Corporations Act*" (**Second Placement Cleansing Notice**).[1843] The Second Placement Cleansing Notice stated that it was issued as a notice pursuant to s 708A(5)(e) of the *Corporations Act* and, amongst other things, that GetSwift had complied with s 674.

[1837] GSW.1001.0001.0338.
[1838] GSW.0031.0003.7546.
[1839] GSW.0031.0003.7546.
[1840] GSW.0031.0003.7546.
[1841] GSW.0031.0003.7546.
[1842] GSW.0031.0003.7546 attaching GSW.0031.0003.7552, and GSW.0031.0003.7565.
[1843] Second Placement Cleansing Notice (GSW.1001.0001.0004).

G.1.16 *2018 ASX Market Update Announcements*

1054 Finally, it is important to summarise a number of ASX announcements that GetSwift made to the ASX in 2018, which form an important aspect of GetSwift's defence to the continuous disclosure allegations, including its Continuing Periods Contention as to materiality: see, e.g., [1115] and [1228] below.

1055 *First*, on 25 January 2018, GetSwift provided a response to the First ASX Aware Query: see [374]. In this response, GetSwift answered questions concerning the Fruit Box Announcement (specifically concerning its materiality, the trial period and its termination), the Fantastic Furniture and Betta Homes Announcement (specifically about its materiality, the initial pilot testing period under the contracts and its termination), various questions concerning the CBA Announcement (specifically concerning its materiality, the initial development period and/or pilot testing trial period, the adoption of the GetSwift Application, projection and deliveries figures), whether other contracts or partnerships were subject to trial period and/or had been terminated, and whether GetSwift was in compliance with the Listing Rules.[1844]

1056 *Secondly*, on 9 February 2018, GetSwift provided a Market Update as a response to the Second ASX Aware Query that GetSwift had received on 6 February 2018: see [379]. In this Market Update, GetSwift answered questions concerning the Fruit Box Announcement, the CBA Announcement, the termination of any agreements (including specifically Fantastic Furniture), a Wall Street Journal Article about a takeover and compliance with the ASX Listing Rules.[1845]

1057 *Thirdly*, on 19 February 2018, GetSwift provided a further Market Update, which clarified the difference between Enterprise Clients and Self-serve Clients, that contracts are typically for two years in length, that 50% of GetSwift's Enterprise Client contracts have progressed to the early stages of the revenue generation phrase and that the majority of announced Enterprise Client contracts were in pre-revenue generation phrases, that testing and analysis was required before achieving full integration with the GetSwift Platform and that GetSwift would continue to assess whether any other contracts were moving to revenue generation phase (or their termination required disclosure to the market).[1846]

[1844] GSW.1000.0001.0065; GSW.1001.0001.0054.
[1845] GSW.1001.0001.0099.
[1846] GSW.1001.0001.0110.

1058 Collectively, I will refer to the responses to the First ASX Aware Query and the Second ASX Aware Query, along with the Market Update of 19 February 2018, as the **2018 ASX Market Update Information**.

H CONTINUOUS DISCLOSURE CLAIMS

1060 Having set out the facts as to GetSwift's relationship with each of the Enterprise Clients, it is necessary to turn to ASIC's claimed contraventions. In this section, I address ASIC's continuous disclosure case against GetSwift and its accessorial liability case against each of the directors.

1061 In very broad terms, ASIC's continuous disclosure case is that GetSwift contravened statutory norms by making the pleaded announcements and failing to disclose material information (of which GetSwift was aware at the time, or subsequently became aware), which was not generally available and which was likely to influence investors in making a decision as to whether to acquire or dispose of GetSwift shares.

1062 Further, in broad terms, ASIC's accessorial liability case is that each of Mr Hunter, Mr Macdonald and Mr Eagle demonstrated an intense focus and appreciation as to the likely effect of the ASX announcements in reinforcing and engendering investor expectations, and the way in which announcements, if released strategically, could increase the GetSwift share price.

1063 In dealing with these claimed contraventions, I propose to structure this section of the reasons in the following way:

- **Part H.1** will summarise the law relevant to the continuous disclosure contraventions, focussing on the requirements in s 674 of the *Corporations Act*.
- **Part H.2** will provide an overview of each of the elements of s 674(2) as they apply to the current case, and make overarching findings as to the *existence*, *awareness*, *general availability*, and *materiality* of certain information. Doing this will shortcut the analysis in respect of each Enterprise Client, particularly with respect to materiality.
- **Part H.3** will then detail my findings in relation to the Enterprise Clients in respect of the four elements of s 674(2). These findings, particularly in relation to *awareness*, will also be relevant to the accessorial liability case against each of the directors.
- **Part H.4** will deal with the accessorial liability aspect of the case, focussing on the requirements in s 674(2A), before turning to make findings in relation to each director in respect of the accessorial liability claims, building on the findings made in Part H.3.

1064 For those seeking to shortcut the labyrinth, reference can be made to the self-explanatory table reproduced below (which summarises whether an element of the continuous disclosure case is made out and where that finding is made (**Y** being code for "Yes", and **N** being code for "No").

Omitted Information			***Existence***	***Awareness***				***General Availability and Materiality***		***Accessorial Liability***		
Enterprise Client and Information Alleged		Factual Circumstance	Existence	Hunter	Macdonald	Eagle	GetSwift	Not Generally Available	Material	Hunter	Macdonald	Eagle
Fruit Box	Fruit Box Agreement Information **24 Feb 2017 to 25 Jan 2018**.	(a) the Fruit Box Agreement contained a trial period, described in the agreement as a "limited roll out" period, ending on 1 April 2017	Y [1277]	Y [1278]	Y [1278]	Y [1279] * From 27 March 2017	Y [1278]	Y [1280]	Y [1283]–[1291]	Y [1979]–[1981], [1983], [1995]–[1996]	Y [2025]–[2026], [2027]–[2029], [2047]	Y [2077], [2079]–[2082]
		(b) the parties were still within the trial period	Y [1277]	Y [1278]	Y [1278]	Y [1279] * From 27 March 2017	Y [1278]	Y [1280]				
		(c) Fruit Box was permitted, at any time in the period up to seven days prior to the expiration of the trial period, to terminate the Fruit Box Agreement by giving notice in writing	Y [1277]	Y [1278]	Y [1278]	Y [1279] * From 27 March 2017	Y [1278]	Y [1281]–[1282]				
		(d) if Fruit Box terminated the Fruit Box Agreement at any time in the period up to seven days prior to the expiration of the trial period, the three-year term of the Fruit Box Agreement would not commence and Fruit Box was	Y [1277]	Y [1278]	Y [1278]	Y [1279] * From 27 March 2017	Y [1278]	Y [1281]–[1282]				

		not obliged to use GetSwift exclusively for its last-mile delivery services.										
	Fruit Box Projection Information **24 Feb 2017 to 25 Jan 2018**	(a) Fruit Box had told GetSwift that it currently made 1.5 million deliveries annually	Y [1295]	*ASIC does not rely upon this information for its continuous disclosure case; relied upon for its misleading and deceptive conduct case.*								
		(b) Fruit Box had not provided GetSwift with its actual historical, or any estimates of, its future projected deliveries or growth in deliveries	Y [1296]–[1301]									
		(c) in making the Fruit Box Projection, GetSwift assumed an annual deliveries growth rate of approximately 24%, without any input from Fruit Box	Y [1296]–[1301]									
	Fruit Box Termination Information **20 March 2017 to 25 Jan 2018**	On 20 March 2017, Fruit Box terminated the Fruit Box Agreement during the trial period	Y [1302]–[1305]	Y [1307]	Y [1308]	Y [1309] * From 27 March 2017	Y [1306]	Y [1311]	Y [1312]–[1314]	Y [2007]–[2008], [2010], [2015]	Y [2057], [2059]–[2060]	Y [2097]–[2099]
CBA	CBA Projection Information **4 April 2017 to date of proceeding**	(a) GetSwift had assumed the CBA Projections over a five year period despite the CBA Agreement being for two years	Y [1322]	Y [1355]	Y [1353]	N/A	Y [1355]	Y [1356]	Y [1357]–[1363]	Y [1998], [2000], [2005]	Y [2049], [2051]–[2052]	N/A
		(b) GetSwift had calculated the CBA Projections by assuming the existence of 55,000 retail merchants of CBA with Albert devices	N [1323]–[1331]	N	N		N	N				

		(c) CBA had informed GetSwift that the number of CBA retail merchants was not 55,000	Y [1332]–[1340]	Y [1351]–[1352]	Y [1353]–[1354]		Y [1355]	Y [1356]				
		(d) the CBA Deliveries Projections and CBA Value Projections had not been provided by, or otherwise approved by, CBA	Y [1341]–[1349]	Y [1351]–[1352]	Y [1353]–[1354]		Y [1355]	Y [1356]				
		(e) the CBA Agreement provided that the GetSwift application that was to be installed on Albert devices (as defined within that agreement) would only be loaded onto those Albert devices with the "merchant category codes agreed by the parties in the Project Plan"	Y [1322]	Y [1355]	Y [1355]		Y [1355]	Y [1356]				
		(f) no merchant category codes had been (or were ever subsequently) agreed between GetSwift and CBA	Y [1322]	Y [1355]	Y [1355]		Y [1355]	Y [1356]				
		(g) an application had not yet been developed, alternatively customised, by GetSwift for deployment on Albert devices	Y [1322]	Y [1355]	Y [1355]		Y [1355]	Y [1356]				
Pizza Pan	Pizza Pan Agreement Information **28 April 2017 to date**	(a) the parties to the Pizza Pan Agreement were GetSwift and Pizza Pan, an Australian proprietary company	Y [1371]	Y [1379]	Y [1379]	Y [1380]	Y [1381]	Y [1382]–[1391]	Y [1394]–[1402]	Y [1979]–[1981], [1984]–[1986],	Y [2025]–[2026], [2030], [2047]	N [2077], [2083]–[2084]
		(b) the Pizza Pan Agreement extended to GetSwift providing its services in	Y [1371]	Y [1379]	Y [1379]	Y [1380]	Y [1381]	N [1382]–[1391]				

	of proceeding	Australia only, and not internationally								[1995]–[1996]		
		(c) the Pizza Pan Agreement was for a term of twelve months only, with an option for Pizza Pan to renew for two further terms of twelve months	Y [1371], [1372]–[1376]	Y [1379]	Y [1379]	Y [1380]	Y [1381]	Y [1392]				
		(d) the Pizza Pan Agreement provided a "limited initial roll out" of the GetSwift Platform; an initial term of twelve months to commence following the "limited initial roll out"; and there would be no charge for the use of the GetSwift Platform during "an initial three month time period"	Y [1371], [1372]–[1376]	Y [1379]	Y [1379]	Y [1380]	Y [1381]	Y [1393]				
		(e) the "initial 3 month time period" had not elapsed	Y [1371], [1377]	Y [1379]	Y [1379]	Y [1380]	Y [1381]	Y [1393]				
APT	APT Agreement Information **8 May 2017 to date of proceeding**	(a) the APT Agreement contained a "free trial period" ending 1 June 2017	Y [1407]	N/A	Y [1408]	N/A	Y [1408]	Y [1409]	Y [1410]–[1417]	N/A	Y [2025]–[2026], [2031], [2047]	N/A
		(b) the parties were still within the "free trial period"	Y [1407]		Y [1408]		Y [1408]	Y [1409]				
		(c) APT was permitted, at any time in the period up to seven days prior to the expiration of the "free trial period", to terminate the APT Agreement by giving notice in writing	Y [1407]		Y [1408]		Y [1408]	Y [1409]				
		(d) if APT terminated the APT Agreement at any time in the	Y		Y		Y	Y				

		period up to seven days prior to the expiration of the "free trial period", the three-year term of the APT Agreement would not commence and APT was not obliged to use GetSwift exclusively for its last-mile delivery services	[1407]		[1408]		[1408]	[1409]				
	APT No Financial Benefit Information **17 July 2017 to date of proceeding**	(a) the free trial period under the APT Agreement had not yet commenced (alternatively, had not yet ended) because APT and GetSwift had agreed to defer the commencement of (or alternatively extend) the trial period until such a time as APT was able to satisfactorily enter and route jobs on the GetSwift Platform	Y [1421]–[1433]	N [1434]	Y [1434]	N/A	Y [1441]	Y [1442]	Y [1443]–[1449]	Y [2007]–[2008], [2011]–[2012], [2015]	Y [2057], [2061]–[2062]	N/A
		(b) the initial term of the APT Agreement had not yet commenced	Y [1420]	N [1434]	Y [1434]		Y [1441]	Y [1442]				
		(c) APT had not yet made any deliveries using the GetSwift Platform	Y [1420]	Y [1434]–[1440]	Y [1434]–[1440]		Y [1441]	Y [1442]				
		(d) APT had ceased engaging with GetSwift	Y [1421]–[1433]	Y [1434]–[1440]	Y [1434]–[1440]		Y [1441]	Y [1442]				
CITO	CITO Agreement Information	(a) CITO had not undertaken any proof of concept, or trial phase, for the GetSwift Platform	Y [1455]	Y [1458]	Y [1458]	N/A	Y [1458]	Y [1459]	Y [1460]–[1469]	Y [1979]–[1981],	Y [2025]–[2026], [2032], [2047]	N/A
		(b) other than signing the CITO Agreement, CITO had not	Y	Y [1458]	Y [1458]		Y [1458]	Y [1459]				

	22 May 2017 to date of proceeding	indicated to GetSwift when, if at all, it proposed to commence using the GetSwift Platform to conduct deliveries	[1455], [1457]							[1987], [1995]–[1996]		
		(c) the CITO Agreement was not a multi-year agreement	Y [1456]	Y [1458]	Y [1458]		Y [1458]	Y [1459]				
		(d) the CITO Agreement had no fixed term	Y [1455]	Y [1458]	Y [1458]		Y [1458]	Y [1459]				
	CITO No Financial Benefit Information **1 July 2017 to date of proceeding**	(a) CITO had not at any time requested or been provided with any of the services referred to in the CITO Agreement	Y [1473]–[1476]	N [1480]–[1481]	Y [1482]	N/A	Y [1483]	Y [1484]	Y [1485]–[1487]	N [2007], [2014]	Y [2057], [2063]	N/A
		(b) CITO had not sought access to or been provided with access to the GetSwift Platform	Y [1477]–[1478]	N [1480]–[1481]	Y [1482]		Y [1483]	Y [1484]				
		(c) CITO had not made any deliveries using the GetSwift Platform	Y [1472]	N [1480]–[1481]	Y [1482]		Y [1483]	Y [1484]				
		(d) CITO had not made any payment to GetSwift	Y [1472]	N [1480]–[1481]	Y [1482]		Y [1483]	Y [1484]				
Hungry Harvest	Hungry Harvest Agreement Information **1 June 2017 to date of proceeding**	(a) the Hungry Harvest Agreement contained a trial period, ending on 1 July 2017	Y [1494]	N/A	Y [1495]	N/A	Y [1495]	Y [1496]	Y [1497]–[1498]	N/A	Y [2025]–[2026], [2033], [2047]	N/A
		(b) the parties were still within the trial period	Y [1494]		Y [1495]		Y [1495]	Y [1496]				
		(c) Hungry Harvest was permitted, at any time in the period up to seven days prior to the expiration of the trial	Y [1494]		Y [1495]		Y [1495]	Y [1496]				

		period, to terminate the Hungry Harvest Agreement by giving notice in writing										
		(d) if Hungry Harvest terminated the Hungry Harvest Agreement at any time in the period up to seven days prior to the expiration of the trial period, the three-year term of the Hungry Harvest Agreement would not commence and it was not obliged to use GetSwift exclusively for its last-mile delivery services	Y [1494]		Y [1495]		Y [1495]	Y [1496]				
Fantastic Furniture	Fantastic Furniture Agreement Information **23 Aug 2017 to date of proceeding**	(a) the Fantastic Furniture Agreement contained a trial period ending on 1 October 2017	Y [1509]	Y [1510]–[1511]	Y [1510]–[1511]	N/A	Y [1510]	Y [1512]	Y [1513]–[1516]	Y [1979]–[1981], [1988], [1995]–[1996]	Y [2025]–[2026], [2034]–[2035], [2047]	N/A
		(b) the parties were still within the trial period	Y [1509]	Y [1510]–[1511]	Y [1510]–[1511]		Y [1510]	Y [1512]				
		(c) Fantastic Furniture was permitted, at any time in the period up to seven days prior to expiration of the trial period, to terminate the Fantastic Furniture Agreement by giving notice in writing	Y [1509]	Y [1510]–[1511]	Y [1510]–[1511]		Y [1510]	Y [1512]				
		(d) if Fantastic Furniture terminated the Fantastic Furniture Agreement at any time in the period up to seven days prior to the expiration of the trial period, the three-year term of the Fantastic Furniture	Y [1509]	Y [1510]–[1511]	Y [1510]–[1511]		Y [1510]	Y [1512]				

		Agreement would not commence and it was not obliged to use GetSwift exclusively for its last-mile delivery services										
	Fantastic Furniture Termination Information **22 Sep 2017 to date of proceeding**	On 22 September, Fantastic Furniture terminated the Fantastic Furniture Agreement	Y [1518]–[1528]	N/A	Y [1529]	N/A	Y [1529]	Y [1530]	Y [1531]–[1538]	N/A	Y [2057], [2064]	N/A
Betta Homes	Betta Homes Agreement Information **23 Aug 2017 to date of proceeding**	(a) the Betta Homes Agreement contained a trial period of two months	Y [1547]	Y [1548]	Y [1548]	Y [1549]–[1550]	Y [1548]	Y [1551]	Y [1552]–[1557]	Y [1979]–[1981], [1988], [1995]–[1996]	Y [2025]–[2026], [2034]–[2035], [2047]	N [2077], [2085]–[2086]
		(b) the Betta Homes Agreement provided that the trial period would not commence until "the parties reasonably agree that [GetSwift's] proprietary software platform is operating effectively and available for immediate use by [Betta Homes]"	Y [1547]	Y [1548]	Y [1548]	Y [1549]–[1550]	Y [1548]	Y [1551]				
		(c) the parties had not yet "reasonably agreed that GetSwift's proprietary software platform is operating effectively"	Y [1547]	Y [1548]	Y [1548]	Y [1549]–[1550]	Y [1548]	Y [1551]				
		(d) if Betta Homes did not give notice in writing electing to continue the Betta Homes Agreement during the trial period, the 18 month term of	Y [1547]	Y [1548]	Y [1548]	Y [1549]–[1550]	Y [1548]	Y [1551]				

		the Betta Homes Agreement would not commence and it was not obliged to use GetSwift exclusively for its last-mile delivery services										
	Betta Homes No Financial Benefit Information **24 Jan 2018 to date of proceeding**	(a) Betta Homes and GetSwift had not yet agreed that GetSwift's proprietary software platform was operating effectively	Y [1559]	N [1562]	Y [1560]–[1561]	N/A	Y [1563]	Y [1564]	Y [1565]–[1568]	N [2007], [2014]	N [2057], [2065]	N/A
		(b) Betta Homes had not completed any trial of the GetSwift Platform	Y [1559]	N [1562]	Y [1560]–[1561]		Y [1563]	Y [1564]				
		(c) Betta Homes had not made any deliveries using the GetSwift Platform	Y [1559]	N [1562]	Y [1560]–[1561]		Y [1563]	Y [1564]				
Bareburger	Bareburger Agreement Information **30 Aug 2017 to date of proceeding**	(a) the Bareburger Agreement, as varied, contained a trial period ending on 1 October 2017	Y [1575]	Y [1576]	Y [1576]	N/A	Y [1576]	Y [1577]	Y [1578]–[1580]	Y [1979]–[1981], [1989]–[1990], [1995]–[1996]	Y [2025]–[2026], [2036]–[2038], [2047]	N/A
		(b) the parties were still within the trial period	Y [1575]	Y [1576]	Y [1576]		Y [1576]	Y [1577]				
		(c) Bareburger was permitted, at any time in the period up to seven days prior to the expiration of the trial period, to terminate the Bareburger Agreement by giving notice in writing	Y [1575]	Y [1576]	Y [1576]		Y [1576]	Y [1577]				
		(d) if Bareburger terminated the Bareburger Agreement at any time in the period up to seven days prior to the expiration of the trial period, the three-year term of the Bareburger	Y [1575]	Y [1576]	Y [1576]		Y [1576]	Y [1577]				

		Agreement would not commence, and it was not obliged to use GetSwift exclusively for its last-mile delivery services										
NAW	NAW Execution Information **18 Aug 2017 to 12 Sep 2017**	On or about 18 August 2017, GetSwift entered into an agreement (NAW Agreement) with N.A. Williams Company (NA Williams) for NA Williams to provide sales and marketing services to GSW in the North American Automotive Aftermarket sector	Y [1584]	Y [1585], [1587]	Y [1585], [1587]	Y [1586]–[1587]	Y [1585]	Y [1589]	Y [1590]–[1592]	Y [2017]–[2020]	Y [2068]–[2070]	Y [2100]–[2101]
	NAW Projection Information **12 Sep 2017 to date of proceeding**	(a) NA Williams was a representative body for manufacturers, retailers and distributors operating in the automotive aftermarket industry (NAW Clients) and could not compel any NAW Client to enter into any agreements, including with GetSwift	Y [1605]	Y [1622]	Y [1622]	N/A	Y [1642]	Y [1644]	Y [1652]–[1655]	N [1998], [2001], [2005]	N [2049], [2053]	N/A
		(b) NA Williams had no involvement in the delivery operations of NAW Clients	Y [1605]	Y [1622]	Y [1622]		Y [1642]	Y [1650]				
		(c) NA Williams did not know what delivery systems, if any, NAW Clients were using	Y [1605]	Y [1622]	Y [1622]		Y [1642]	Y [1650]				
		(d) NA Williams did not know whether NAW Clients would be interested in the GetSwift Platform	Y [1605], [1606]–[1607]	Y [1622]	Y [1622]		Y [1642]	Y [1650]				

		(e) NA Williams had not disclosed to GetSwift any independent information data or research to assist in quantifying the annual numbers of deliveries for either the entire automotive aftermarket or channel customers	Y [1608]–[1609]	Y [1623]	N [1624]		Y [1642]	Y [1650]				
		(f) the NAW Transaction Projection was based on a high level estimate of the total addressable market for the GetSwift Platform in the North American automotive aftermarket industry made by NA Williams together with GetSwift	Y [1610]	Y [1625]	N [1626]		Y [1642]	Y [1645]				
		(g) GetSwift did not, alternatively did not adequately, discount the NAW Transaction Projection to take into account competition, regulatory constraints, uptake by NAW Clients or other barriers to servicing the total addressable market	N [1611]–[1615]	N [1627], [1628]–[1629], [1632]	N [1627], [1630]–[1631], [1632]		N	N				
		(h) GetSwift, did not, alternatively did not adequately, conduct independent research to ascertain the competition, regulatory constraints, the potential for uptake by NAW Clients or other barriers to servicing the total addressable market	N [1611]–[1614], [1616]	N [1627], [1628]–[1629], [1632]	N [1627], [1630]–[1631], [1632]		N	N				

		(i) the NAW Agreement had a term of three years	Y [1604]	Y [1622]	Y [1622]	N [1640]–[1641]	Y [1642]	Y [1650]				N [2093], [2094]
		(j) the NAW Agreement allowed NA Williams to terminate with 90 days' notice	Y [1604]	Y [1622]	Y [1622]	Y [1639]	Y [1642]	Y [1650]				
		(k) the NAW Agreement did not, and could not, oblige NA Williams or any of the NAW Clients to use GetSwift's services or to make deliveries using the GetSwift Platform and did not, and could not, oblige NAW Clients to enter into any agreement with GetSwift	Y [1604]	Y [1622]	Y [1622]	Y [1639]	Y [1642]	Y [1646]				
		(l) in order for GetSwift to generate any revenue under the NAW Agreement, GetSwift was required to negotiate and enter into separate agreements with each individual NAW Client either directly or through its agent NA Williams	Y [1617]	Y [1622]	Y [1622]	Y [1639]	Y [1642]	Y [1647]				
		(m) Genuine Parts Company (GPC) had evaluated the GetSwift Platform and had decided not to adopt it in favour of another platform	Y [1618]–[1619]	Y [1633]	Y [1633]	N/A	Y [1642]	Y [1650]				N/A
		(n) other than GPC, none of the NAW Clients had trialled or agreed to trial the GetSwift Platform	Y [1604]	Y [1634]	Y [1634]		Y [1642]	Y [1650]				

		(o) none of the NAW Clients had entered into any agreement with GetSwift to use the GetSwift Platform	Y [1604]	Y [1634]	Y [1634]		Y [1642]	Y [1650]				
		(p) NA Williams had not given GetSwift any information about the price that NAW Clients might pay per delivery as no such information was available to NA Williams at the time	Y [1620]	Y [1635]	Y [1635]		Y [1642]	Y [1650]				
Johnny Rockets	Johnny Rockets Agreement Information **25 Oct 2017 to date of proceeding**	(a) the Johnny Rockets Agreement contained a "limited roll out period" ending 1 December 2017	Y [1665]	Y [1666]	Y [1666]	N/A	Y [1666]	Y [1667]	Y [1668]–[1670]	Y [1979]–[1981], [1991], [1995]–[1996]	Y [2025]–[2026], [2039]–[2041], [2047]	N/A
		(b) the "limited roll out period" had not commenced	Y [1665]	Y [1666]	Y [1666]		Y [1666]	Y [1667]				
		(c) Johnny Rockets was permitted, at any time in the period up to seven days prior to the expiration of the "limited roll out period", to terminate the Johnny Rockets Agreement by giving notice in writing	Y [1665]	Y [1666]	Y [1666]		Y [1666]	Y [1667]				
		(d) if Johnny Rockets terminated the Johnny Rockets Agreement at any time in the period up to seven days prior to the expiration of the "limited roll out period", then the three-year term of the Johnny Rockets Agreement would not commence; and it was not obliged to use	Y [1665]	Y [1666]	Y [1666]		Y [1666]	Y [1667]				

		GetSwift exclusively for its last-mile delivery services										
	Johnny Rockets Termination Information **9 Jan 2018 to date of proceeding**	On 9 January 2018, Johnny Rockets terminated the Johnny Rockets Agreement	Y [1673]–[1677]	Y [1678]	Y [1679]	N/A	Y [1680]	Y [1681]	Y [1682]–[1683]	Y [2007]–[2008], [2013], [2015]	Y [2057], [2066]	
Yum	Yum MSA Information **1 Dec 2017 to date of proceeding**	(a) the Yum MSA did not have a fixed term	Y [1691]	Y [1699]	Y [1699]	Y [1699]	Y [1700]	Y [1701]	Y [1706]–[1709]	Y [1979]–[1981], [1992], [1995]–[1996]	Y [2025]–[2026], [2042]–[2045], [2047]	N [2077], [2087]–[2090]
		(b) the Yum MSA allowed Yum and Yum Affiliates to terminate for any or no reason by giving 30 days' notice	N [1692]–[1695]	N	N	N	N	N				
		(c) the services to be provided and the revenues to be derived under the Yum MSA were to be determined pursuant to Statements of Work (SOW) to be agreed between GetSwift, Yum and Yum Affiliates in the future	Y [1691]	Y [1699]	Y [1697], [1699]	Y [1699]	Y [1700]	Y [1701]–[1703]				
		(d) no Statement of Work had been issued under the Yum MSA by Yum or any Yum Affiliates	Y [1691]	Y [1699]	Y [1697], [1699]	Y [1699]	Y [1700]	Y [1701]–[1703]				
		(e) the Yum MSA did not obliged Yum or any Yum Affiliate to issue any SOW; did not oblige Yum or any Yum Affiliate to use GetSwift's services or to make the deliveries using the	Y [1691]	Y [1699]	Y [1697], [1699]	Y [1699]	Y [1700]	Y [1701]–[1703]				

		GetSwift Platform; and did not oblige any Yum Affiliate to enter into any agreement with GetSwift										
		(f) due to the terms of the Yum MSA, the number of deliveries the agreement may generate was not determinable	Y [1691]	Y [1696], [1699]	Y [1699]	Y [1699]	Y [1700]	Y [1701]–[1703]				
	Yum Projection Information **1 Dec 2017 to date of proceeding**	(a) Yum was contemplating conducting proof of concept trials of the GetSwift Platform in two test markets although it had not yet determined the two markets in which to conduct the trials	Y [1713]–[1716]	N [1720]	N [1720]	N [1726]	N	N	Y [1742]–[1745]	Y [1998], [2002]–[2004], [2005]	Y [2049], [2054]–[2055]	N [2093], [2095]
		(b) any adoption of the GetSwift Platform by Yum beyond the contemplated proof of concept trials was conditional on the successful completion of the proof of concept trials	Y [1717]	Y [1723]	Y [1723]	N [1726]	Y [1730]	Y [1732]–[1735]				
		(c) Yum was testing other service providers in various markets which offered services similar to GetSwift	Y [1718]	Y [1723]	Y [1723]	N/A	Y [1730]	Y [1736]–[1737]				N/A
		(d) Yum did not give GetSwift the Yum Deliveries Projection	Y [1712]	Y [1723]	Y [1722]		Y [1730]	N [1738]–[1740]				
		(e) Yum could not compel any Yum Affiliate to enter into any agreements including with GetSwift and use the GetSwift Platform	Y [1712]	Y [1723]	Y [1723]	Y [1727]–[1728]	Y [1730]	Y [1741]				N [2093], [2095]

		(f) no SOW had been issued under the Yum MSA by Yum or any Yum Affiliate	Y [1712]	Y [1723]	Y [1723]	Y [1729	Y [1730]	Y [1741]				
Amazon	Amazon MSA Information **1 Dec 2017 to date of proceeding**	(a) GetSwift had signed a global master services agreement with Amazon	Y [1754]	Y [1755]	Y [1755]	Y [1755]	Y [1755]	N [1760]	Y [1765]–[1774]	Y [1979]–[1981], [1993]–[1994], [1995]–[1996]	Y [2025]–[2026], [2046], [2047]	N [2077], [2091]
		(b) the extent of the services to be provided and the revenues to be derived under the Amazon MSA were to be generated from specific transactions, to be agreed with Amazon pursuant to the Amazon MSA	Y [1754]	Y [1755]	Y [1755]	Y [1755]	Y [1755]	Y [1761]				
		(c) the Amazon MSA did not oblige Amazon to agree any Service Order with GetSwift	Y [1754]	Y [1755]	Y [1755]	Y [1755]	Y [1755]	Y [1761]				
		(d) Amazon had not agreed any Service Order with GetSwift under the Amazon MSA	Y [1754]	Y [1755]	Y [1755]	Y [1755]	Y [1755]	Y [1761]				
		(e) the Amazon MSA did not oblige Amazon to use GetSwift's services or to make deliveries using the GetSwift Platform	Y [1754]	Y [1755]	Y [1755]	Y [1755]	Y [1755]	Y [1762]				
		(f) due to the terms of the Amazon MSA, the number of deliveries the agreement may generate was not determinable	Y [1754]	Y [1755]	Y [1755]	Y [1755]	Y [1755]	Y [1762]				
		(g) the Amazon MSA allowed Amazon to terminate for any or no reason by giving 30 days' notice	Y [1754]	Y [1755]	Y [1755]	Y [1755]	Y [1755]	Y [1763]				

Second Placement	Second Placement Information **7 Dec 2017 to date of proceeding**	GetSwift had not notified the ASX of the following information: (a) the Fruit Box Agreement Information; (b) the Fruit Box Termination Information; (c) the CBA Projection Information; (d) the Pizza Pan Agreement Information; (e) the APT Agreement Information; (f) the APT No Financial Benefit Information; (g) the CITO Agreement Information; (h) the CITO Agreement; (i) the Hungry Harvest Agreement Information; (j) the Fantastic Furniture Agreement Information; (k) the Betta Homes Agreement Information; (l) the Fantastic Furniture Termination Information; (m) the Bareburger Agreement Information; (n) the NAW Projection Information; (o) the Johnny Rockets Agreement Information; (p) the Yum MSA Information; and (q) the Yum Projection Information.	Y [1781]	Y [1782]	Y [1782]	N/A	Y [1782]	Y [1783]	Y [1784]–[1785]	Y [2021]	Y [2071]	N/A

H.1 The Relevant law

H.1.1 *Background and rationale*

1065 The necessity for a company to take steps to prevent a false market from being created in relation to its shares has a long genesis.

1066 Indeed, as long ago as the late nineteenth century, a company requesting admission to the official list of the Sydney Stock Exchange was required to agree to the condition that it must give prompt notification of all calls, dividends, alteration of capital or other material information. This established the principle and the contractual obligation that a listed company must release material information to the market on an ongoing basis and as such was a forerunner of the continuous disclosure requirement: see Coffey J, *Enforcement of continuous disclosure in the Australian stock market* (2007) 20 AJCL 301; a more comprehensive historical survey of the continuous disclosure obligations is canvassed in Golding G and Kalfus N, *The continuous Evolution of Australia's Continuous Disclosure Laws* (2004) 22 C&SLJ 385.

1067 It suffices to note that the listing rules were refined over time and an earlier version of the Listing Rule 3.1, discussed below, required a company immediately to notify any information that would be likely to affect materially the price of its securities or is necessary to avoid the establishment of a "false market".

1068 In November 1991, the House of Representatives Standing Committee on Legal and Constitutional Affairs released a report in which the Attorney-General recommended that a regime of "continuous disclosure" by listed companies should be "introduced, implemented and enforced through the ASX Listing Rules": House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders* (Commonwealth of Australia, Canberra, 1991) p 106–107.

1069 The original statutory provision enforcing continuous disclosure by listed companies was introduced in 1994, being s 1001A of the *Corporations Law*. This provision mandated compliance with a revised Listing Rule 3.1 which had removed the "false market" test and imposed a rule in substantially the same form as is presently relevant.

1070 The rationale of the continuous disclosure regime is apparent. It is usefully described in Part 8 of the Department of Treasury, *CLERP Paper No. 9: Proposals for Reform – Corporate Disclosure* (Department of Treasury, Canberra, 2002) (at [8.2]):

> The primary rationale for continuous disclosure is to enhance confident and informed participation by investors in secondary securities markets … Continuous disclosure of materially price sensitive information should ensure that the price of securities reflects their underlying economic value. It should also reduce the volatility of securities prices, since investors will have access to more information about a disclosing entity's performance and prospects and this information can be more rapidly factored into the price of the entity's securities.

1071 Put simply, as was noted in *National Australia Bank Limited v Pathway Investments Pty Ltd* [2012] VSCA 168; (2012) 265 FLR 247 (at 260 [61] per Bell AJA, with whom Bongiorno JA and Harper JA agreed), the purpose of the continuous disclosure provisions:

> … 'is to ensure an informed market in listed securities' and that 'all participants in [that] market ... have equal access to all the information which is relevant to, or more accurately, likely to, influence decisions to buy or sell those securities'.

H.1.2 *The relevant provisions*

1072 At the times material to this case, s 674 of the *Corporations Act* was in the following terms:

> **674 Continuous disclosure—listed disclosing entity bound by a disclosure requirement in market listing rules**
>
> *Obligation to disclose in accordance with listing rules*
>
> (1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.
>
> (2) If:
>
> (a) this subsection applies to a listed disclosing entity; and
>
> (b) the entity has information that those provisions require the entity to notify to the market operator; and
>
> (c) that information:
>
> (i) is not generally available; and
>
> (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;
>
> the entity must notify the market operator of that information in accordance with those provisions.

1073 At all material times, Listing Rule 3.1 relevantly provided as follows:

> Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.

1074 As was touched upon above when dealing with the pleading dispute, it follows from the terms of the Listing Rule, that to establish a contravention of s 674(2) of the *Corporations Act*, ASIC must demonstrate facts which make out what can be conveniently described as four elements or "requirements":

(1) there existed "information";

(2) the entity had that information and was aware of it;

(3) the information was not "generally available"; and

(4) a reasonable person would expect that information, if it were generally available, to have a "material effect" on the price or value of the entity's shares.

H.1.3 *Information*

1075 The *first* requirement is that there must be something constituting "information". Listing Rule 19.12 relevantly defines "information" as including "matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market" and "matters relating to the intentions, or likely intentions, of a person". The question of whether there is information can sometimes be a matter of some controversy, partly because the elucidation of its reach "will, invariably, be assisted by analysis against specific factual circumstances": *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; (2016) 245 FCR 402 (***Grant-Taylor (FC)***) (at 418–419 [94] per Allsop CJ, Gilmour and Beach JJ).

1076 The Note to Listing Rule 3.1 provides a list of non-exhaustive examples of the types of information, depending on the circumstances, which might require disclosure including, as one might expect, "the entry into, variation or termination of a material agreement".

H.1.4 *Awareness of information*

1077 The *second* requirement is that the entity *has* information which the Listing Rules require it to notify the market operator: *Grant-Taylor (FC)* (at 418–419 [94] per Allsop CJ, Gilmour and Beach JJ). It must also be established that the entity was "aware" of the information, in the sense that an officer of the entity has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer: *Masters v Lombe (Liquidator); In the Matter of Babcock & Brown Limited (in liq)* [2019] FCA 1720 (at 97 [273]–[274] per Foster J); citing *Grant-Taylor (FC)* (at 434 [185] per Allsop CJ, Gilmour and Beach JJ).

1078 This aspect of a continuous disclosure case can be controversial.

1079 Two defined terms used in Listing Rule 3.1 are important in understanding this requirement. *First*, the definition of "aware" in Chapter 19.12 of the Listing Rules is in the following terms:

> [A]n entity becomes aware of information if, and as soon as, an officer of the entity … has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

1080 *Secondly*, s 9 of the *Corporations Act* defines "officer" in the following terms (which applies to the Listing Rules pursuant to Listing Rule 19.3(a)):

> **'officer'** of a corporation means:
>
> (a) a director or secretary of the corporation; or
>
> (b) a person:
>
> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
>
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
>
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act …

1081 It was submitted, somewhat generally on behalf of the defendants, that Listing Rule 3.1 only required GetSwift to disclose opinions which were *actually* held or possessed by the entity. It was also asserted that this does not require the officers of a company to form an opinion in which they do not in fact hold. In this regard particular reliance was placed on what was said in *Grant-Taylor v Babcock & Brown Limited (in liq)* [2015] FCA 149; (2015) 322 ALR 723 (at 755–756 [156]–[158] per Perram J); *Grant-Taylor FC* (at 432–435 [172]–[187] per Allsop CJ, Gilmour and Beach JJ); *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747; (2019) 140 ACSR 38 (at 232 [1136] and 236–238 [1168]–[1173] per Beach J).[1847]

1082 Expressed at this level of generality, this submission is an oversimplification. As is evident from the provisions extracted above, including importantly, the definition of "aware", s 674(2) operates by reference to the material information of which an officer of the entity has, *or ought reasonably to have,* come into possession. All such information amounts to information of

[1847] GCS at [73]–[74].

which the entity *is aware*. It follows that the information of which an officer ought reasonably to have come into possession includes opinions the officer ought to have held by reason of facts known to the officer.

1083 It is unnecessary to explore this point further in the present case or reconcile it with the *dicta* of Perram J in *Grant-Taylor* (at 755–756 [156]–[158]) and Beach J in *Myer* (at 232 [1136]) as to when an opinion or inference does not "come into possession" of the corporation which, with great respect, may have been appropriate in the circumstances of those cases, but might be thought to be less than accurate if expressed as a matter of general principle. It is noteworthy that, in *Grant-Taylor (FC)*, the Full Court held there was no appellable error in that case on the basis that even if (as is the fact, in my respectful view) the relevant test was not whether the entity had knowledge of the relevant information but whether it had, or ought reasonably to have, come into possession of the information: see *Grant-Taylor (FC)* (at 434 [181]–[183] per Allsop CJ, Gilmour and Beach JJ).

1084 The reason why this is not of real significance presently is because ASIC's case against GetSwift as to awareness is based almost entirely on the alleged *actual* knowledge of one or more of Mr Hunter and Mr Macdonald and in some instances, Mr Eagle.[1848] The awareness case in the present case has not been run on the basis of constructive knowledge or, put more accurately, information in the form of an opinion of one of the directors that he ought reasonably to have had but did not, in fact, have.

1085 This is not a continuous disclosure case with the complexities that one oftentimes finds in forecast cases or cases relying heavily on opinions, such as opinions as to solvency. Speaking generally, this is a case about information as to the entity striking or potentially striking deals with commercial counterparties which had the potential to generate significant revenue – this might be thought to be the Tigris and Euphrates of material information.

[1848] GCS at [73].

H.1.5 *General availability of information*

1086 The *third* requirement is that the information must not be generally available. Sections 676(2) and (3) of the *Corporations Act* describe circumstances when information is taken to be generally available for the purposes of s 674:

> **676 When information is generally available**
>
> …
>
> (2) Information is generally available if:
>
> (a) it consists of readily observable matter; or
>
> (b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:
>
> (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and
>
> (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.
>
> (3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
>
> (a) information referred to in paragraph (2)(a);
>
> (b) information made known as mentioned in subparagraph (2)(b)(i).

1087 The phrase "readily observable matter" is not defined in the *Corporations Act*. The requirement is a question of fact to be determined on an objective and hypothetical basis. Information, of course, may be readily observable even if no one has observed it. The test of whether material is readily observable is not whether the particular matter was actually observed but whether it "could have been observed readily, meaning easily or without difficulty": see *Grant-Taylor (FC)* (at 424 [119] per Allsop CJ, Gilmour and Beach JJ).

1088 More generally, the Full Court in *Grant-Taylor (FC)* identified four important matters concerning the construction of s 676:

(1) *First*, broadly speaking, "material notified to the ASX becomes generally available on the basis that it is readily observable matter. Further, material stated in a financial report released by a company is a readily observable matter": at 424 [121].

(2) *Secondly*, s 676(2)(b)(ii) requires the information to be made known to a cross section of the investors who commonly invest in the securities. It will be insufficient if the

information is released to a small sector of the investors who commonly invest in the securities: at 424 [122].

(3) *Thirdly*, the party seeking to prove the lack of general availability of the information by reference to s 676(3) is required to negative the existence of any relevant "deductions, conclusions or inferences": at 425 [124].

(4) *Fourthly*, similar language is employed in the insider trading provisions contained in the *Corporations Act*: see s 1042C(1) of the *Corporations Act*. As such, guidance may also be drawn from cases in this context.

1089 In *R v Firns* [2001] NSWCCA 191; (2001) 51 NSWLR 548 (at 565 [88]), Mason P, with whom Hidden J agreed, stated that "[o]bservability does not depend upon proof that a person or group of persons actually perceived the information"; rather, the issue involves a factual inquiry in which "the objective and hypothetical circumstances are to be looked at, not merely the actualities in the particular case". His Honour concluded that for the purposes of the former s 1002B(2)(a), "it does not matter how many people actually observe the relevant information. … Nor is s 1002B(2)(a) concerned with the time that is likely to elapse between the information becoming 'readily observable' and when it was in fact observed. Information may be readily observable even if no one observed it": (at 564 [77] per Mason P).

1090 These principles were approved by Jacobson J in *Australian Securities and Investments Commission (ASIC) v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; (2007) 160 FCR 35, who confirmed (at 106 [546]) that "observability does not depend on proof that persons actually perceived the information; the test is objective and hypothetical": citing *R v Firns* (at [88]). Of note, his Honour was critical of expert evidence led by ASIC to the effect that the question of whether information was "generally available" should be determined by considering whether the information "was generally known": *Citigroup* (at 107 [549]–[553] per Jacobson J).

H.1.6 *Materiality*

1091 The *fourth* requirement is provided for by s 674(2)(c)(ii) of the *Corporations Act*. For the purposes of s 674, s 677 relevantly provides that a reasonable person will be taken to expect information to have a "material effect" on the price or value of securities if that information "would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of" the shares. As was explained in *Australian Securities and Investments Commission v Vocation (in liq)* [2019] FCA 807; (2019) 371 ALR 155 (at 281–

282 [516] per Nicholas J), s 677 is in the nature of a deeming provision, which describes a sufficient, but not a necessary foundation for establishing the materiality requirement under s 674(2)(c)(ii).

1092 In *Grant-Taylor (FC)* (at 420 [96]), the Full Court said:

> What is meant by "material effect" in s 674(2)(c)(ii)? As stated earlier, s 677 illuminates this concept and also identifies the genus of the class of "persons who commonly invest in securities". It refers to the concept of whether "the information would, or would be likely to, influence [such] persons … in deciding whether to acquire or dispose of" the relevant shares. The concept of "materiality" in terms of its capacity to influence a person whether to acquire or dispose of shares must refer to information which is non-trivial at least. It is insufficient that the information "may" or "might" influence a decision: it is "would" or "would be likely" that is required to be shown: *TSC Industries Inc v Northway Inc* 426 US 438 (1976). Materiality may also then depend upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event on the company's affairs (*Basic Inc v Levinson* 485 US 224 (1988) at 238 and 239; see also *TSC v Northway*). Finally, the accounting treatment of "materiality" may not be irrelevant if the information is of a financial nature that ought to be disclosed in the company's accounts. But accounting materiality does have a different, albeit not completely unrelated, focus.

1093 As noted above, the phrase "persons who commonly invest in securities" is not defined in the *Corporations Act* but it has been accepted that the expression is a "class" description which avoids distinctions between large or small, frequent or infrequent, sophisticated or unsophisticated "individual" investors, but does not extend to the irrational investor: *Grant-Taylor (FC)* (at 423 [115]). It follows that "the objective question of materiality posed by ss 674 and 675 by reference to the hypothetical reasonable person in turn has regard to what information would or would be likely to influence a hypothetical class of persons namely 'persons who commonly invest in securities'": *Grant-Taylor (FC)* (at 423 [116]). The class incorporates persons investing in any securities, not just shares in the type of company in question, whether as to size or sector: *Vocation* (at 282 [517] per Nicholas J); citing *Grant-Taylor (FC)* at (426 [130]–[131].

1094 The test of materiality is an objective test: *James Hardie* (at 111 [527] per Spigelman CJ, Beazley and Giles JJA). In *Grant-Taylor,* Perram J noted (at 737 [64]):

> What s 677 poses is an objective test to be applied at the time it is alleged the disclosure should have occurred. This involves a survey of all of the available material including, because they are part of the factual matrix, the views of the company and individual investors while accepting, of course, that those views cannot by themselves be determinative [*citations follow*]. … Despite this *ex ante* approach, it is nevertheless permissible to examine how the market subsequently behaved when the information was disclosed as a device for confirming the correctness of a conclusion already reached.

(Citations omitted).

1095 The correctness of this observation was not questioned on appeal, and the Full Court turned to the interplay between Listing Rule 3.1 and ss 674(2) and 677, putting beyond doubt that: (a) materiality is a question which is looked at *ex ante* and it depends upon a balancing of both the indicated probability that a relevant event will occur and the anticipated magnitude of the event on the company's affairs; and (b) the class of "persons who commonly invest in securities" to whom the Court ought have regard in determining materiality (by assessing whether those persons would have been influenced in their investment decisions by the release of the alleged material information) includes not just sophisticated investors, but small, infrequent and unsophisticated investors: *Grant-Taylor (FC)* (at 419–420 [95]–[96], 426 [131]).

1096 It follows that although the considerations taken into account by a company and its reasons for withholding certain information from the market may be relevant, they are not determinative: *James Hardie* (at 195 [527]). Of course, the fact that officers of an entity may themselves reasonably believe that information would not be expected to have a material effect does not answer the question of whether the material was required to be disclosed: *Vocation* (at 281 [515]; citing *James Hardie* (at 195 [527] and 199 [546]).

1097 Further, s 677 differs in its focus from the treatment of materiality in accounting, in that the accounting treatment of materiality has less relevance where the information is not financial information of a type that is required to be disclosed in a company's accounts: *Vocation* (at 282 [518]); citing *Grant-Taylor (FC)* 402 (at 420 [96]).

1098 To satisfy the "materiality" requirement imposed by s 674(2)(c)(ii), the information must be "non-trivial" and rise beyond information that which "may" or "might" influence a decision by investors and it must be shown that the information "would" or "would be likely" to influence a decision: *Grant-Taylor (FC)* (at 420 [96]. In determining whether information is material, this may involve a balancing of the probability that a particular event will occur and the anticipated impact of the event on the company's business: *Vocation* (at 282 [519]).

1099 The relevant "influence" is that which bears upon common investors. This was explained in *Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586; (2009) 264 ALR 201 (at 309 [521] per Gilmour J):

> The relevant influence is that bearing upon common investors, relevantly, "deciding whether to acquire or dispose of" [the relevant securities]. **Influence which is productive of mere consideration but no decision either way is not the relevant statutory influence.** This is so because the primary question under s 674(2) is whether

> the information is such that a reasonable person would expect it to have a material effect on "the price or value" of [the relevant securities]. Information which would or would likely influence common investors merely to consider whether to buy or sell [the relevant securities] but not decide to buy or sell could never be expected to have a material effect on the price or value of those securities.
>
> (Emphasis added).

1100 In determining whether information (had it been generally available) would be expected by a reasonable person to have a material effect on the price or value of a company's securities, the Court held, in *James Hardie*, that this is a matter which can be appropriately addressed by expert evidence: (at 139 [228]). Such evidence may aid the Court in determining the predictive exercise that the sections require; although it is not determinative.

1101 With respect to the predictive exercise to be undertaken, Gilmour J noted in *Fortescue* (at 307 [511]) that "the resolution of the question upon an *ex ante* approach involves a matter of judgment, informed by commercial common sense and, if necessary, by evidence from persons who have practical experience in buying and selling shares and in the workings of the stock market".

1102 In *Vocation*, Nicholas J explained that information may need to be considered in its "broader context" to determine whether it satisfies the statutory test of materiality, including "whether there is additional information beyond what is alleged not to have been disclosed and what impact it would have on the assessment of the information that the plaintiff alleges should have been disclosed": (at 294–295 [566]), citing *Jubilee Mines NL v Riley* [2009] WASCA 62; (2009) 253 ALR 673 and *James Hardie*.

1103 Evidence of the actual effect of the information actually disclosed on share price may be relevant in determining whether s 674(2) of the *Corporations Act* has been contravened. It has been accepted that such evidence may constitute a relevant cross-check as to the reasonableness of an *ex ante* judgement about a different hypothetical disclosure: *Fortescue* (at 301 [477] per Gilmour J), cited with approval in *James Hardie* (at 197 [534]–[535]). I will return to this point below as it forms an aspect of what might be described as GetSwift's case theory in relation to the alleged continuous disclosure contraventions.

1104 Finally, section 5.9 of the Listing Rules (Guidance Note 8), and in particular, footnote 167, states that some investors may expect "corrective disclosures" to be made to correct or qualify previous disclosures

H.2 Overarching Findings

1105 Having set out the factual background revealed by the available evidence, it is clear that, although not identical, elements of the narrative of each Enterprise Client do tend to resonate with one another, with trends being identifiable throughout. It is perhaps for this reason that elements of each party's submissions tended to be repetitive.

1106 In this section, I will make some general observations and overarching findings as to the four elements that make up ASIC's continuous disclosure case. By approaching the analysis in this way, it is intended that the analysis with respect to each Enterprise Client will be shortcut.

1107 It is important to highlight that in a case of this magnitude, it is impossible to refer to all of the evidence and it is unnecessary for me to do so. It should go without saying that the failure to refer to any particular item of evidence below should not be regarded as meaning that I have not considered it. I have. To similar effect, as noted in the introduction, the paragraph numbers that I have cross-referenced to the factual narrative above should not be considered as the only source upon which I have relied to reach the conclusions; rather, they have been provided to assist readers in identifying *a* source of the findings made. Further, I should note that when, for convenience, I refer to submissions being made by GetSwift, this is shorthand, in that, in relevant respects, these submissions were adopted by Messrs Hunter, Macdonald, and Eagle.

1108 In relation to the alleged continuous disclosure contraventions, four broad categories of information, collectively referred to as the **omitted information**, are identified by ASIC:

(1) information relating to the terms of the relevant agreements between GetSwift and the Enterprise Clients (**Agreement Information**);

(2) information concerning the supposed factual matters or assumptions that GetSwift utilised to estimate the number of transactions and/or deliveries expected following GetSwift entering into customer agreements (**Projection Information**);

(3) information concerning the supposed factual matters which made it unlikely that GetSwift would receive a financial benefit having entered into certain customer agreements (**No Financial Benefit Information**); and

(4) information pertaining to the alleged termination of certain agreements between GetSwift and the Enterprise Clients (**Termination Information**).

H.2.1 *Existence and awareness*

1109 It is useful to commence by setting out some overarching observations as to way in which ASIC advanced its case concerning the existence and awareness of the omitted information.

1110 *First*, a "term sheet" or "agreement" was signed by GetSwift and each of the Enterprise Clients. For the most part, the material terms of these agreements were not in issue. In most cases, the client "agreements" were no more than a term sheet and did not include any attached standard terms and conditions. Some of the term sheets contained amended terms reflecting a high degree of informality: in one case, the price payable under the arrangement was redacted (see [695]); and in other cases, the term of the arrangement was subject to a handwritten amendments or informal and off-hand suggestions were given by GetSwift to the client to sign the Term Sheet: see [525], [606], [687] and [814].

1111 *Secondly*, ASIC contends that following entry into these agreements, GetSwift submitted an announcement to the ASX, which was subsequently released to the market. The material terms and content of each of the announcements, as well as the fact that GetSwift submitted the announcements to the ASX, were not in dispute and Mr Hunter and Mr Macdonald made various admissions that they either contributed to the drafting, or directed and authorised the transmission of these announcements to the ASX. Speaking generally, this suggests that they were aware of the contents of the announcements, but I will deal with the specific documentary evidence in support of this in relation to each Enterprise Client below.

1112 *Thirdly*, ASIC contends that upon these announcements being released, there were a number of other factual circumstances that existed (being circumstances that GetSwift failed to disclose to the ASX). This relates to the categories described above, collectively referred to as the omitted information. While admissions were made in respect of some of these circumstances, the existence of other parts of the information remained in dispute. As such, where relevant, I will deal with these issues of contest.

1113 *Fourthly*, GetSwift admitted that it was aware of some parts of the omitted information. Where no admissions were made, ASIC says that because Mr Macdonald (in relation to all of the Enterprise Clients), Mr Hunter (in relation to almost all of the Enterprise Clients), and Mr Eagle (in relation to a limited number of Enterprise Clients) had actual knowledge that information had been omitted by GetSwift, in the sense that they had come into possession of information in the course of the performance of their duties, GetSwift must have also been aware of the information: *Lombe* (at 97 [273]–[274] per Foster J), citing *Grant-Taylor (FC)* (at 434 [185]

per Allsop CJ, Gilmour and Beach JJ). As outlined above, ASIC's case against GetSwift as to awareness is directed to the *actual* knowledge of one or more of the directors: see [1084].[1849] As such, the process of fact finding in this part of the case primarily requires me to determine whether, from the documentary record, it can be established that the directors had actual knowledge of the omitted information.

1114 *Fifthly*, if the information is found to exist, the defendants have, to a significant extent, admitted that GetSwift did not notify the ASX of the omitted information during the alleged period of contravention. Where it has been proved that information existed which was not notified to the ASX at the time of the relevant announcement, GetSwift did not later qualify, withdraw or correct each of the ASX announcements until the end date of the alleged contravention. In this regard, the period of contravention alleged by ASIC in respect of each of the Enterprise Clients is generally concerned with the period from when the relevant announcement was released to the ASX to the date of institution of this proceeding. There are only two exceptions to this: the *first* is in relation to Fruit Box, in respect of which ASIC asserts that the end date of the contravention was 25 January 2018 (the date when GetSwift provided a response to the ASX); and the *second* is in relation to the Amazon MSA Information, in respect of which ASIC asserts that the end of the contravention was the release of the Second Amazon Announcement.

1115 Flowing from this, GetSwift submits that ASIC has not engaged with the continuing time periods applicable to its allegations.[1850] Specifically, in relation to APT, Hungry Harvest, Fantastic Furniture, Bareburger and Johnny Rockets Agreement Information,[1851] GetSwift, Mr Hunter and Mr Macdonald contend that I should have regard to GetSwift's response to the ASX Aware Query dated 25 January 2018 (see [1055]); GetSwift's Market Update dated 9 February 2018[1852] (see [1056]) and GetSwift's Market Update dated 19 February 2018[1853] (see [1057]) (which I have collectively defined as the 2018 ASX Market Update Information) as well as media reporting at the time. In the event I do not accept this submission, however, the defendants have admitted (in the alternative) that GetSwift did not notify the omitted information from the date of the ASX announcement to the date of commencement of this

[1849] See, e.g., 4FASCOC at [31], and [268(a)(ii)].
[1850] GCS at [231]–[232].
[1851] Defences at [78], [120], [136], [142], [168], and [208].
[1852] GSW.1001.0001.0099.
[1853] GSW.1001.0001.0110.

proceeding. It is important to foreshadow that in the relevant parts of the reasons below, I engage with the time periods and assess whether material may have been disclosed at an earlier date to that which is contended by ASIC.

H.2.2 *General availability of information*

1116 I now turn to make some general findings regarding the general availability of the omitted information, by reference to each category of omitted information.

Agreement Information

1117 In so far as the majority of the Agreement Information is concerned, the primary point of contest between the parties is whether the following information was generally available from the Prospectus, term sheets, or otherwise: (a) the existence of the trial periods; (b) the right to terminate during the trial periods; (c) that the customer had not started the trial; and (d) that the trial period had not yet concluded. These issues emerged in relation to Fruit Box, Pizza Pan, APT, CITO, Hungry Harvest, Fantastic Furniture, Betta Homes, Bareburger and Johnny Rockets. Comparably, the ASX announcements relating to NA Williams, Yum and Amazon raised issues which are somewhat idiosyncratic. I will deal with these separately below.

GetSwift Prospectus

1118 The starting point in assessing the general availability of the Agreement Information is GetSwift's Prospectus. Mr Andrew Molony, an expert witness called by ASIC and an individual who has worked in investments and financial markets for over 20 years, gave the unsurprising evidence that the Prospectus was important in framing investor views on GetSwift's model and the indicators by which its future performance was to be measured.[1854] This is due to a lack of comparable companies, a limited availability of equity research on GetSwift and the rapidly evolving nature of technology related businesses.[1855] While GetSwift contends there were other comparable companies, the evidence points to no other company operating a software as a solution last-mile delivery platform in Australia.

[1854] First Molony Report (GSW.0002.0004.0001_R) at [3]–[4], and [11].
[1855] First Molony Report (GSW.0002.0004.0001_R) at [11].

1119 The Prospectus stated that GetSwift had embarked upon a "growth strategy",[1856] and made plain that its revenue was dependent on its ability to attract new businesses to use its platform and related services.[1857] Indeed, the Prospectus revealed that GetSwift was a business that was reliant upon entry into contracts with clients to generate current and future revenue. In this regard, given the link between the number of deliveries and its fee structure (which generated revenue per delivery), GetSwift's entry into firm, revenue generating contracts with Enterprise Clients (being those organisations expected to have trading volumes of 10,000 deliveries per month) would be expected by investors as being the critical factor in assessing GetSwift's likely future cash flows. It is obvious how important that factor would be for a rational investor placing a net present value on the anticipated future cash flows in the process of valuing the stock.

1120 Within this context, the ways in which parties seek to characterise and then deploy the Prospectus are in stark contrast.

Perpetually on Trial and Terminable at Will Contention

1121 GetSwift contends that the Agreement Information was generally available to the market from information published about GetSwift's business model and what investors would deduce from that and other information. A feature of this contention (which was repeated with an atomic clock regularity throughout its submissions) is that investors knew from all the available information (namely, information from the Prospectus) that GetSwift was perpetually on trial with its customers and that contracts were terminable at will.[1858] I will refer to this contention in the reasons below as the **Perpetually on Trial** and **Terminable at Will Contention**.

1122 The Perpetually on Trial and Terminable at Will Contention is two-fold. *First*, GetSwift contends that, due to its pay-per-use model which only required clients to pay a fee to GetSwift in respect of each delivery that was processed and completed using the GetSwift platform, the practical consequence of GetSwift's pay-per-use model was that "the GetSwift platform was

[1856] Prospectus (GSW.1001.0001.0478) at 0491, 0505, 0506, and 0523.
[1857] Prospectus (GSW.1001.0001.0478) at 0492.
[1858] GCS at [31]–[35]; [36]–[39], and [201]–[211].

effectively 'on trial' for the entire duration of any customer engagement."[1859] GetSwift's revenue model was described in the Prospectus as follows:

> Revenue is generated on a per delivery basis using a transaction fee of up to $0.29 per delivery. Discounts are applied to larger clients using a tiered fee structure, based on the client's monthly transactional volume and the length of contract commitment. No fixed maintenance or upfront set-up fees apply. Additional fixed subscription fees are payable on a per delivery driver basis for fleet management and smart routing. SMS charges are on-charged as status updates are sent via SMS to the client's end customer.[1860]

1123 *Secondly*, GetSwift contends that the market was also informed that GetSwift's customer agreements were terminable at will. In support, GetSwift relies on the following section titled "Specific Risks" in the Prospectus:

> **6.2.3 Clients may terminate accounts at will**
>
> Even once clients are successfully attracted to the GetSwift platform and related services, clients may terminate their relationship with the Company at any time. If a number of clients were to terminate their arrangements with the Company as permitted under the terms of the agreement with such clients, this may have an adverse impact on the Company's business, financial position, results of operations, cash flows and prospects.[1861]

1124 In particular, reliance was placed on an aspect of the cross-examination of Mr Molony, where following a series of questions relating to the Prospectus, the following exchange occurred:

> MR DARKE: And you agree that the relevant generally available information about GetSwift included that clients could reduce or even cease using the GetSwift platform at any time if they chose to do so? --- Yes, it included that.
>
> And it also included that clients could terminate their relationships with GetSwift at any time; correct? --- Yes.[1862]

1125 It is said that Mr Molony was not alone in this evidence: such an acceptance was also reflected in the evidence of the investor witnesses in relation to other aspects of the alleged non-disclosed information. For example, it is said that Mr Maroun Younes, an Investment Analyst employed by FIL Investment Management (Australia) Limited (**Fidelity**), clearly understood that after

[1859] GCS at [32]–[33].
[1860] Prospectus (GSW.1001.0001.0478) at 0507.
[1861] Prospectus (GSW.1001.0001.0478) at 0522.
[1862] T944.41–46 (Day13).

contracts were entered into, they would be subject to a proof of concept or trial period: see [1133] below.

ASIC's contentions

1126 ASIC submits that the general information available as to GetSwift's pay-per-use model, the prospect of termination at will and that clients would trial GetSwift's Platform before moving onto an executed contract does not detract from ASIC's case, either as to general availability or materiality.[1863] Rather, ASIC draws a distinction between announcements concerning current clients that have entered into a contract and an announcement concerning a prospective client which is undertaking a trial (or has agreed to undertake a trial) from which no revenue will be generated until the trial has concluded.[1864]

1127 On this basis, ASIC's case places significant reliance upon two pieces of information said to be expressly conveyed in the Prospectus:

(1) client contracts were entered into *following* a 90-day proof of concept or trial; and

(2) clients who had entered into a proof of concept trial with GetSwift had a 100% sign up rate to contracts.[1865]

1128 From these statements, ASIC contended that what was *generally available* to the market was that by the time a client had entered into a contract with GetSwift, a proof of concept or trial had *already* been successfully concluded. As such, it was said that the Prospectus represented to investors that the executed contracts (the subject of the ASX announcements) were the source of likely future revenue flows, consistent with GetSwift's "growth strategy".

1129 Furthermore, ASIC argues that any statements in the Prospectus must be viewed contextually. An important part of this context is what was said about the topic of company announcements generally, including the First Quantifiable Announcements Representation (which was after the Fruit Box Announcement and CBA Announcement), which conveyed that GetSwift was expecting "transformative and game changing partnerships" that would be "announced *only*

[1863] ARS at [20].
[1864] ARS at [21].
[1865] ACS at [1367]–[1388]; Prospectus (GSW.1001.0001.0478) at 0489, and 0507. See also **May 2017 Presentation** (GSW.1001.0001.0562) at 0576.

when they were *secure, quantifiable and measurable*".[1866] It was said that the First Quantifiable Announcements Representation, together with the statements on the topic of disclosure in the Prospectus, confirm the way in which the announced contracts were represented as being only those in which the proof of concept or trial had *already* been completed.

1130 Of course, what the market and investors would have understood from the Prospectus, the ASX announcements and the First Quantifiable Announcements Representation must be "juxtaposed" with the true reality of the commercial and legal substance of the term sheets: *Forrest* (at 504–512 [32]–[60] per French CJ, Gummow, Hayne and Kiefel JJ). ASIC's contention is that, in substance, most of the client arrangements were in fact *conditional* upon the successful and satisfactory conclusion of a proof of concept or trial. That is, the reality was that GetSwift stood to obtain no revenue under these arrangements until the conclusion of the respective trial periods, and even then, this was subject to the client deciding not to terminate the trial or proceed with the arrangement. It is said that this information, which would have clarified the actual status of GetSwift's arrangements, was not generally available.

Consideration

1131 The evidence of Mr Younes is of some limited use in assessing the general availability of the information. While I will address the evidence of Mr Younes below in the context of materiality, it is convenient to say something about his evidence here. Mr Younes gave evidence concerning typical client contracts in the technology, media and telecommunications (**TMT**) sector, although it is important to emphasise that Mr Younes' evidence concerns matters as to the "usual practice" as opposed to the invariable or uniform practice.[1867]

1132 Relevantly, Mr Younes explained:

(1) customer agreements within the TMT sector are typically "formal contracts with a reasonable degree of certainty in generating future revenue inflows";[1868]

[1866] April 2017 Appendix 4C (GSW.1001.0001.0459) (emphasis added).
[1867] T777.25–34 (Day 11); T779.3–14 (Day 11).
[1868] Affidavit of Maroun Younes affirmed 6 September 2019 (**Younes Affidavit)** (GSW.0009.0028.0001_R) at [16].

(2) "proof of contract arrangements usually only cover trial periods, with no certainty of generating reliable longer-term revenue";[1869]

(3) it was not general practice to make market announcements which referred to customer contracts or agreements when the product or service "is still in proof of concept and/or a trial period";[1870]

(4) it was his expectation that unless an announcement stated otherwise, the "arrangement had moved beyond proof of concept and/or trial period";[1871] and

(5) a qualifying statement in a market announcement would usually be made if a contract was in a trial phase.[1872]

1133 There is one aspect of Mr Younes' evidence that has caused me some pause. During his cross-examination in relation to the Yum Announcement and the Yum MSA Information (which was on different terms to the Agreement Information for those clients who had only signed the Term Sheets),[1873] Mr Younes accepted that in his affidavit, the words "proof of concept", "trial period" and "pilot" were all periods in which the customer had an opportunity to customise the product, fix any problems, "cease using the product or to terminate their relationship with the vendor if they're not satisfied".[1874] He also understood that the NA Williams arrangement "would involve an initial pilot of the product in select parts of the network" and "if for any reason an initial pilot wasn't successful or to the customer's liking the customer might cease using the software" and that the revenue figure was "a stretch".[1875] GetSwift contends that it was therefore generally known by the market and investors that even *after* a client contract was entered into by GetSwift, there would be a process of "on boarding", roll out and integration, or that there would be trials or pilots – each being interchangeable descriptions used to convey that there would be a period of time during which the efficacy, operation and functionality of GetSwift's platform would continue to be tested. Further, GetSwift argues that because "his

[1869] Younes Affidavit (GSW.0009.0028.0001_R) at [16].
[1870] Younes Affidavit (GSW.0009.0028.0001_R) at [16].
[1871] Younes Affidavit (GSW.0009.0028.0001_R) at [16]; T776.39–42 (Day 11).
[1872] T777.36–44 (Day 11).
[1873] T786.23–787.33 (Day 11).
[1874] T787.5–13 (Day 11).
[1875] T782.14–783.45 (Day 11). See also in relation to Amazon: T788.18–30 (Day 11).

evidence on this was of general application", Mr Younes' evidence should be the same for every announcement he considered; specifically, NA Williams, Yum and Amazon.[1876]

1134 In respect of these three specific Enterprise Clients (which were notably excluded from ASIC's list in its closing submissions on this issue and which GetSwift suggested was an implied concession that ASIC accepted this information was discernible in respect of those agreements),[1877] there is perhaps a stronger case for GetSwift's contention. I will deal with the impact of such evidence when addressing the general availability of the Agreement Information in relation to each of these Enterprise Clients. However, two general points should be made: *first*, the surmise of one person about a particular factual circumstance does not establish that the omitted information "could have been observed readily, meaning easily or without difficulty": *Grant-Taylor (FC)* (at 424 [119] per Allsop CJ, Gilmour and Beach JJ); and *secondly*, any submissions that Mr Younes' evidence was of "general application" in the sense that it should apply to each of the ASX announcements in relation to Fruit Box, Pizza Pan, APT, CITO, Hungry Harvest, Fantastic Furniture, Betta Homes, Bareburger and Johnny Rockets, is doubtful in circumstances where Mr Younes did not consider these announcements and GetSwift did not put the same matters to the other investor witnesses who did.[1878]

1135 Further, this line of cross-examination tended to elide two distinct concepts: on the one hand, a client assessing and testing the suitability of a product where there is no binding obligation to pay and where the client can simply walk away from the relationship; and on the other hand, a roll out and full implementation period in which there is an exclusive contract, where the client is bound to pay fees for using the product and where, although the client can still terminate, they cannot use an alternative supplier by reason of the exclusivity provisions.[1879] In respect of the *former*, it might be said that the client is undertaking an "exploratory process" not only to determine whether the product meets its requirements but also to determine whether it should bind itself to an exclusive, multi-year arrangement; whereas in the *latter*, the client would have already undertaken these processes, even though it might recognise that integration

[1876] GCS at [209].
[1877] ACS at [1380]; GCS at [209].
[1878] ACS at [1379]–[1380]; ASIC Reply at [53].
[1879] ACS at [1381].

could take some time to occur. As Mr Vogel, an Investment Manager employed by Thorney Investment Group Australia Pty Ltd (**Thorney**), explained in relation to the CBA Announcement, it was his understanding that it would take some months, if not a year, for integration to occur.[1880] Tellingly, it was never put to Mr Vogel, or, indeed, to Mr Younes, that they understood from the various ASX announcements that no proof of concept stage or trial had been undertaken at all or had not yet concluded prior to the making of each announcement.

1136 GetSwift's response to this, with regards to its Perpetually on Trial and Terminable at Will Contention, is that in either case, an investor knew from the information in the Prospectus that the value of the announced contract is always at risk because a client may stop using the GetSwift Platform. On this basis, it is said that an investor would therefore not have discerned any relevant difference between the two scenarios.

1137 GetSwift's Perpetually on Trial and Terminable at Will contention must be rejected. It is of course the case that in both scenarios, there is a risk that revenue or substantive revenue will not be generated, but it is jejune to suggest that the risk is the same. In the scenario where a client has concluded a trial and moved onto an executed contract, an investor can make an assessment of the net present value of likely future revenue flows on the basis that the client has tested the product, is presumably satisfied with its functionality and other attributes given it has elected to continue beyond the trial, and has entered into a contract (sometimes an exclusive one for "multiple" years) to money to use the service. In that instance, a rational investor would apply a discount for the risks associated with cessation of use, termination, further customisation or trial. By contrast, an investor may consider an announcement made in the scenario where a prospective client has not yet commenced a trial, or has not yet concluded a trial, and has only signed a "Term Sheet" to participate in that trial, to be of no or very limited value in assessing the prospect of future revenue or the investor may decide to apply a materially increased discount for risk.

1138 In the present case, the market was not given the opportunity to make that assessment with respect to the ASX announcements. Certainly, the subset of the generally available information

[1880] Affidavit of Anthony Vogel sworn 4 September 2019 (**Vogel Affidavit)** (GSW.0009.0013.0001_R) at [12]; ACS at [1381]–[1382].

relied upon by GetSwift (including that contained in the Prospectus) did not give investors this important contextual and qualifying information.

1139 Furthermore, the problem with GetSwift's emphasis on the Prospectus is that it focusses laser like on those parts which are favourable to it and, in doing so, fails to consider the information in the "broader context" of the Agreement After Trial Representations and the Quantifiable Announcements Representation. The isolation of evidence from Mr Molony is also of no moment and suffers the same vice as plucking references from the Prospectus; it must be viewed in the context of what was else was being communicated to the market. For example, later in the cross-examination of Mr Molony, the following exchange occurred:

> MR DARKE: And you agree that those matters meant that GetSwift's revenue from its customers was subject to significant risks and uncertainties; correct? --- Well, this is – I think all these statements are taken from the risk section of the prospectus so they would be considered in that context along with other statements in the prospectus about GetSwift's capacity to – or track record in retaining enterprise clients from the proof of concept phase into ongoing contracts
>
> …
>
> Mr Molony, I'm not asking you to describe the totality of generally available information and I'm not asking about the other parts of the prospectus. I'm just asking you whether you agree that the matters that I've drawn your attention to in the prospectus indicated that GetSwift's revenues from its customers were subject to significant risks and uncertainties. Do you accept that? --- Look, they're undoubtedly part of the prospectus which is part of the publicly available information in GetSwift, but I think the broader context in terms of the information in the [Prospectus] is relevant at the same time, so I'm not saying … what you're pointing to in the terms of the risk section of the prospectus no doubt exists in terms of publicly available information. **What I'm saying to you is from an investor perspective those issues would be considered alongside the other things in the prospectus.**[1881]

1140 This evidence makes intuitive sense and is clearly correct.

1141 Broadly speaking, I am satisfied that what was generally available to the market was that the announced contracts had been entered into *after* a proof of concept had been successfully concluded and where revenue would be secure, quantifiable and measurable. Indeed, it would be unrealistic to accept that a hypothetical reasonable investor, when reading the ASX announcements, would ignore the Agreement After Trial Representations and Quantifiable

[1881] T945.1–35 (Day 13) (emphasis added).

Announcements Representations and reach a conclusion that: (a) an Enterprise Client had agreed to a trial or pilot; (b) if successful, the client would "move" into an unconditional, multi-year and exclusive agreement; and (c) the trial and any agreement could be terminated for any reason and the distinction between them was immaterial: as further reasoned at [2176]–[2181].[1882] Therefore, speaking generally, what was not generally available, known or able to be deduced, was information as to announced contracts remaining in a trial period, or some contracts not having even commenced a trial or proof of concept stage.[1883]

Further omitted information

1142 As developed in relation to each Enterprise Client below, the *Projection Information* was not generally available and GetSwift made no suggestion that the Projection Information as it relates to the CBA, Second NAW and Yum Announcements was generally available.

1143 Broadly speaking, GetSwift contends that the *No Financial Benefit Information* and *Termination Information* was generally available and could be discerned because: (a) the Prospectus adverted to the risk that clients could simply not use the platform (given it was a pay-per-use-model); (b) the fact that agreements could be terminated at will; and (c) GetSwift was reporting modest to limited revenue in its Appendix 4C disclosures. None of these contentions establish that it was generally known by investors that the particular contracts that had been announced, and which were among the corpus of information from which they would make assessments of future revenue flows, had ceased to have effect, or, indeed, had not even commenced. The absence of a specific contrary announcement in respect of the individual Enterprise Clients terminating an agreement is notable. As will be developed in relation to each Enterprise Client, this suggests investors would have assumed that any announced contracts remained on foot.

H.2.3 *Materiality*

1144 A significant aspect of the continuous disclosure case rests on the element of materiality. Substantial submissions have been advanced in respect of this issue and it is necessary to canvass them. I do so in deference to the detailed submissions made on the point, but some

[1882] ASIC Reply at [25].
[1883] ACS at [1370]–[1384].

arguments as to materiality had a high degree of artificiality about them. As explained below, this is, after all, a concept understood by reference to common sense. Speaking generally, as is manifest from the contemporaneous documents, the public-relations driven approach to market communication by GetSwift promoted enthusiastically by Mr Hunter and Mr Macdonald had, as its raison d'être, the notion that what was being conveyed was likely to influence market perceptions of the value of GetSwift's shares – that was the whole point. These subjective motivations may not be directly relevant to a differently focussed objective enquiry as to what *was not conveyed*, but, again speaking very generally, it is not intuitively surprising that information omitted from communications fashioned in such a tactical way, may be likely, as matter of common sense, to be material.

1145 In any event, to position the analysis, it is convenient to identify broadly the case theories advanced by both of the parties:

(1) *ASIC's case theory,* is that the omitted information was "important contextual and qualifying information"; it would have, among other things, indicated to an investor that the realisation of the benefits stated in the various ASX announcements (expressly or by necessary implication) which arose from entry into a contract with a significant Enterprise Client, as well as the expectations engendered among investors, was less certain; and, in the case of the Projection, Termination and No Financial Benefit Information, the omitted information would have revealed that there was no prospect of the projections or financial benefits being achieved; and

(2) *GetSwift's case theory,* appears to be premised on everything that could possibly be argued to the contrary, including, among other things, that information as to GetSwift's business model was known to investors; that since the ASX announcements did not expressly state the expected benefits to GetSwift, they could not be material, and any qualifying material could equally not be material; and that establishing materiality is contingent upon assessing the impact of the omitted information on share price.

1146 Of course, these are very broad brush summaries and it will be necessary to detail them with particularity below, but they provide a useful frame for analysis as one embarks upon this inquiry. In attempting to reconcile the submissions advanced on the materiality point, I will to adopt the following structure:

(1) *First*, I will examine the case theory advanced by ASIC, the evidence adduced in support of this case theory and the evidentiary attacks mounted by GetSwift.

(1) *Secondly*, I will group and address the contentions advanced by GetSwift in response to ASIC's case theory.

(3) *Thirdly*, I will conclude and articulate the approach to be applied for the remainder of these reasons.

ASIC's case theory

1147 It is first necessary examine the evidence adduced and submissions advanced by ASIC on materiality issue, being: (a) the information as to the risks of GetSwift; (b) the evidence of Mr Molony; and (c) the evidence of various investor witnesses.

Information relevant to investors

1148 ASIC accepted that there were a number of *general* risks inherent in investing in GetSwift known by investors. These included: (a) GetSwift was newly listed with a nascent technology; (b) its pay-per-use transaction model meant that clients could cease using the GetSwift Platform; (c) it had low revenue; (d) there was uncertainty as to future revenues and earnings; (e) it operated in a fast evolving and highly competitive technology industry which meant that other products and technologies could replace its platform; (f) the unfamiliarity of the board and management; and (g) GetSwift was a relatively unproven stock. Further, the following *specific* risks could be discerned from the Prospectus: (a) minimal or declining adoption of GetSwift's services; (b) limited uptake of its services; (c) if clients did not use the GetSwift Platform, they did not pay; (d) contracts were terminable-at-will; and (e) the threat of competition.[1884]

1149 However, in ASIC's submission, merely identifying the risks, or ascertaining that GetSwift was a high risk investment, does not answer the question of whether the information would influence persons in deciding whether to acquire or dispose of shares.[1885] Instead, as noted above, materiality is to be assessed on an *ex ante* basis, by reference to matters of common sense: see *Fortescue* (at 307 [511] per Gilmour J). In this way, the identification of risks, it was said, does not negate or qualify GetSwift's obligations to disclose information that it would ordinarily be required to be disclosed.[1886] ASIC submits that the Prospectus must be read as a

[1884] Prospectus (GSW.1001.0001.0478) at 0523–0524.
[1885] ACS at [1397].
[1886] ACS at [1392]–[1397].

whole and, as well as identifying the risks, the Prospectus identified that GetSwift was in a high growth phase, was seeking to expand, the source of its future revenue would be contracts with clients especially Enterprise Clients and those clients would enter into contracts *after* a proof of concept period. These were the expectations, it is said, that were engendered among investors, and which were then reinforced by the Quantifiable Announcement Representations as to GetSwift's expectation of announcing transformative and game changing partnerships but only when the financial benefits associated with them was secure, quantifiable and measurable.

1150 As a means of assessing the upside or benefit of the investment, ASIC recognised that investors would have looked to the announced contracts as the essential basis upon which to make their own assessments (using the tools at their disposal) to project future revenue and make a decision as to whether to acquire or dispose of GetSwift shares. In turn, they would have applied a discount or adopted mitigation strategies to make allowances for *known* risks. However, it was said that what was *unknown* to investors was that many of the announced contracts, in reality, were subject to a trial period which had not yet commenced, that the projection information was subject to substantial qualification that would have affected the assessment of potential revenue flow from the contract, and even that some of the previously announced contracts had been terminated or had not led to the use of GetSwift's platform.[1887]

1151 As discussed above, ASIC highlights that a fundamental distinction exists between: (a) an executed contract that has been successfully completed; and (b) a contract which is subject to a proof of concept or trial period. It is said that the distinction between these scenarios would have impacted how an investor assessed the risk and attribution of value to each of the announcements in determining whether to acquire or dispose of GetSwift's shares. For example, it was said that in the *former* scenario, a rational investor would apply a discount for the risks that might emerge from cessation of use, termination, further customisation or trial, but would understand that many uncertainties had been removed; whereas in the *latter* scenario, a rational investor would regard any announcement to be of little or no value when assessing the prospect of future revenue or materially increase the discount for the heightened risk (such as the fact that a client may decide that implementation would be too costly or time consuming,

[1887] ACS at [1399]–[1401].

or the fact that the software might not deliver the productivity or efficiency as promised). As the factual narrative confirmed, many of GetSwift's Enterprise Clients – including Fruit Box, Pizza Hut, APT, CITO, Fantastic Furniture, Betta Homes and Johnny Rockets – did not proceed to use the GetSwift Platform. This demonstrates the considerable risks inherent in a trial or proof of concept phase.[1888]

The evidence of Mr Molony

1152 ASIC opened its case on the basis that materiality would be established through its expert, Mr Molony; although it did concede that while expert evidence may assist in assessing the materiality of the omitted information, it was not determinative and ultimately the question of materiality was one for the Court.[1889]

1153 Mr Molony is a highly experienced individual and his opinion came from someone engaged in the buying and selling of shares and working in the stock market: *Fortescue* (at 307 [511] per Gilmour J). While, as Beach J noted in *Myer Holdings* (at 153 [659]), the value of the evidence of an expert of this type might be limited to some extent by the fact that he was not in the position of a research analyst, I do not accept GetSwift's contentions that a fair characterisation of Mr Molony's evidence is that his perspective can only be as good as a "lay investor".[1890] This characterisation does not accord with Mr Molony's extensive experience in financial markets. It is not just research analysts who analyse company fundamentals and information.

1154 By way of background, Mr Molony produced two expert reports: a report dated 19 September 2019 (**First Molony Report**),[1891] and a report dated 2 July 2020 (**Second Molony Report**).[1892] In the First Molony Report, Mr Molony explained that "the price performance of GetSwift shares would be 'event driven'" and therefore related to the release of ASX announcements.[1893] He also explained that there was a "linkage between announcements related to new client contracts and the rises in the GetSwift share price".[1894] When GetSwift highlighted that the vast

[1888] ACS at [1402]–[1403].
[1889] T31.35–32.14 (Day 1); T33.18–34.34 (Day 1); T57.28–41 (Day 1); T180.18–43 (Day 3); T193.11–194.13 (Day 3).
[1890] GCS at [270].
[1891] First Molony Report (GSW.0002.0004.0001_R).
[1892] Second Molony Report (GSW.0002.0004.0601_R).
[1893] First Molony Report (GSW.0002.0004.0001_R) at [9].
[1894] First Molony Report (GSW.0002.0004.0001_R) at [10].

majority of announcements did not result in a material positive share price reaction, the Second Molony Report was produced. In this Report, Mr Molony recognised that although many of the announcements did not result in a material change to the share price, this could be explained by reference to "investor expectations".[1895]

1155 By way of summary, Mr Molony opined that investors would have relied upon GetSwift's ASX announcements due to the absence of research reports prepared by equity analysts.[1896] The investor expectations, as generated by the ASX announcements, were said to be an "important driver" of GetSwift's share price.[1897] This included expectations regarding the impact of the various contract announcements, which referenced preceding announcements, as well as expectations regarding future contract announcements.[1898] In assessing the likelihood of GetSwift capturing the full benefits associated with previous contract wins, Mr Molony opined that:

> [I]nvestors would consider the statement in the GetSwift IPO Prospectus regarding the Company's track record in retaining enterprise contracts - "GetSwift's enterprise clients who have entered into POC have a 100% sign up rate to contracts as at the date of the Prospectus.[1899]

1156 Further, Mr Molony's gave evidence that the most important elements of GetSwift's customer contracts which investors would have focussed on included:

(1) the nature of the contractual arrangements between GetSwift and its clients especially in relation to term, size, scope, exclusivity, pricing and contract terminations;

(2) the size and growth prospects of each client contract in terms of future delivery volumes and revenues;

(3) new client trials, completion of client trials and successful transition from trials to longer term contracts;

[1895] Second Molony Report (GSW.0002.0004.0601_R) at [11].
[1896] First Molony Report (GSW.0002.0004.0001_R) at [12].
[1897] First Molony Report (GSW.0002.0004.0001_R) at [13]; Second Molony Report (GSW.0002.0004.0601_R) at [7].
[1898] Second Molony Report (GSW.0002.0004.0601_R) at [8]–[9].
[1899] Second Molony Report (GSW.0002.0004.0601_R) at [13].

(4) the ongoing retention of GetSwift's client base, delivery volumes and revenues over time; and

(5) losses of current or prospective clients during or following a trial period and the underlying reasons for the loss.[1900]

1157 Moreover, by reference to the cumulative impact of the various announcements and the way in which these announcements would have shaped investor views and expectations, Mr Molony pointed to a contextual matter: the fact that between 24 February 2017 and 1 December 2017, there were almost 20 announcements which presented "good news" (as opposed to "bad news").[1901] From this, he opined that investors would have assumed all previous GetSwift contracts were "on foot" and any unqualified and stated benefits would be captured by GetSwift. Further, as GetSwift increased the number of announcements expressing "good news", investors would have naturally expected the benefits from secured contracts to grow.[1902] Together with the frequency and growing size of new contracts, this would have reinforced previous investor expectations as well as heightened expectations of additional major contracts.[1903] On this basis, ASIC submits that a common sense approach was consistent with Mr Molony's evidence that GetSwift's share price was "event driven",[1904] as well as the fact that new contract announcements merely supported market expectations; namely, that the benefits of existing contracts were being captured and further contract announcements were forthcoming.[1905]

1158 It should be noted that although Mr Molony produced two reports, the following question and answer appeared at the beginning of the Second Molony Report:

> Q. Do you need to amend, qualify or otherwise change any of the opinions you express in your report dated 19 September 2019 and supplementary report dated 14 April by reason of the Further Revised Factual Background that is annexed to these questions?
>
> A. **My opinions expressed in my report dated 19 September 2019 remain**

[1900] Second Molony Report (GSW.0002.0004.0601_R) at [14].
[1901] First Molony Report (GSW.0002.0004.0001_R) at [13].
[1902] First Molony Report (GSW.0002.0004.0001_R) at [14].
[1903] First Molony Report (GSW.0002.0004.0001_R) at [14].
[1904] First Molony Report (GSW.0002.0004.0001_R) at [9].
[1905] Second Molony Report (GSW.0002.0004.0601_R) at [11], and at [15(c)].

unchanged by reason of the Further Revised Factual Background.[1906]

1159 While substantial parts of the First Molony Report and the Second Molony Report were rejected, including his evidence in respect of the specific alleged non-disclosed information, other parts were admitted. The defendants made the forensic decision to discount the value of Mr Molony's evidence, and decided not to challenge directly the residuum nor call contradictory expert evidence. This was perhaps understandable given what remained of Mr Molony's evidence seemed to me to be largely applied common sense. But the general approach of GetSwift was subject to two matters emphasised in closing submissions.

1160 *First*, GetSwift now seeks to undermine Mr Molony's evidence by impugning his credibility as a witness *generally*. It is said that Mr Molony "was a somewhat unsatisfactory witness" given, at times, he could not directly answer questions, engaged in unresponsive answers and sought to dispute obvious matters.[1907] A particular exchange said to be representative of this non-responsiveness occurred when Mr Molony was asked about some of the negative information in several media articles,[1908] including him apparently seeking to dispute that plainly negative news was, in fact, negative. Moreover, it was said that Mr Molony sought to dispute that the announcement of a class action would be generally negative (even suggesting that lots of companies have "been successful in defending them"). Only after much effort did he accept "it's not good news",[1909] before providing the following response:

> But nowhere in your report, I suggest to you, do you set out any analysis of the effect that these articles or the information contained in them may have had on GetSwift's share price when it resumed trading on 19 February 2018. That is right, isn't it? **I don't think that was part of the – part of my brief.**
>
> Mr Molony, I'm not being critical of you for not doing that. I'm just asking you to accept that that is not something that you have done. Do you agree with that? **I don't think I've done it, because I don't think it was part of the brief.**[1910]

1161 *Secondly*, GetSwift contends that the conclusions provided by Mr Molony contained scant reasoning, were of "little value" given their generality, were not linked to any alleged specific non-disclosed information, and did not assist in the assessment of materiality as no analysis

[1906] Second Molony Report (GSW.0002.0004.0601_R) at [1]–[2] (emphasis added).
[1907] GCS at [269].
[1908] See, e.g., T946.33–949.34 (Day 13).
[1909] T951.28 (Day 13).
[1910] T952.41–953.3 (Day 13) (emphasis added).

was undertaken as to the impact of the ASX announcements on share price.[1911] To the extent that Mr Molony opines that GetSwift's share price might have been reacting to different matters, it is said that these are matters of financial economics and therefore Mr Molony's evidence can only be as good as the perspective of a "lay investor" as opposed to an "investor perspective".[1912]

1162 Although they have a kernel of truth, on balance, I do not accept that either of these contentions is made out to the extent that GetSwift submits. In any event, although I do not reject Mr Molony's evidence, it was not of great significance.

1163 *First*, the contentions as to Mr Molony's credit should be rejected. Mr Molony was seeking to assist the Court. To the extent he debated issues which might have been thought to yield a clear answer, I do not attribute this to him being "difficult". Rather, Mr Molony was attempting to be meticulous in what he presented to the Court by reference to the matters in respect of which he thought he was being asked to give evidence. I accept that, occasionally this did lead him to be reticent in making some concessions. However, overall, this did not detract from his credit.

1164 *Secondly*, GetSwift's attacks on the evidentiary value of Mr Molony's reports are somewhat overstated. The admitted parts of Mr Molony's reports did reinforce the matters that drove investor expectations and the information about GetSwift that investors regarded as important (although, as I have already said, none of this was really more than common sense).[1913] Importantly, the expression of Mr Molony's opinions does not turn upon an assessment of share price, or the conduct of an event study (the significance of which I will return to below).[1914] Rather, to the extent it goes somewhat further than matters that would be obvious to anyone with a rudimentary knowledge of how share markets work, Mr Molony's evidence reflects the informed and practical experience of a person who has bought and sold shares for a living over a considerable period: *Fortescue* (at 307 [511] per Gilmour J).

1165 In the end, materiality is a question for the Court and the opinion evidence is of limited utility. There is no reason, however, as to why I should reject the opinions of Mr Molony; particularly

[1911] GCS at [270]–[271].
[1912] GCS at [270].
[1913] ASIC Reply at [45].
[1914] C.f. GCS at [273]–[275].

given they are unremarkable. For example, it is wholly unsurprising that in the context of a business like GetSwift that is reliant upon entry into contracts with clients to generate current and future revenue, investors would look to announced contracts as a means by which to assess any upside and benefit, make their own assessments (using the tools at their disposal) to project future revenue, and make a decision as to whether to acquire or dispose of GetSwift shares.

1166 It is also unremarkable, as Mr Molony opines, that almost 20 announcements presenting "good news" over a nine-month period, would engender expectations among investors that everything was smooth sailing, that benefits of existing contracts were being captured, and further contract announcements were forthcoming.

1167 Finally, as I will expand upon below, a demonstrable link of a certain type between ASX announcements and share price is not critical, and was not the purpose of Mr Molony's Reports.

Investor witnesses

1168 On the question of materiality, ASIC also called four investor witnesses (**Investor Witnesses**):

(1) Mr Anthony Vogel, who, as described above, is an Investment Manager employed by Thorney;

(2) Mr Timothy Hall, a Senior Investment Manager employed by Fairview Equity Partners Pty Ltd (**Fairview**);

(3) Mr Maroun Younes, who, as described above, is an Investment Analyst employed by Fidelity; and

(4) Ms Katherine Howitt, a portfolio manager at Fidelity.

1169 I will summarise the evidence given by each of the Investor Witnesses and how their views are said to support ASIC's case. I will then deal with some overarching submissions made by GetSwift.

1170 At a high level, ASIC submits that the relevance of the Investor Witnesses is that they provide an insight into the means by which investment analysts valued the GetSwift stock. Importantly, it is said that the evidence of the Investor Witnesses is consistent with Mr Molony's evidence, in that they sought to ascribe value to GetSwift's shares by reference to projected revenue to be derived from the announced contracts, with what they considered to be an appropriate discount for risk. However, what they did not know, it is said, was that the announced contracts were subject to the substantive qualifications in the omitted information which was not disclosed to

the market. Ultimately, whether the Investor Witnesses overstated their valuation of GetSwift's shares, or did not adequately discount for risk, is not in issue. What is in issue is whether the omitted information was material to investors.[1915]

1171 ***Mr Vogel*** gave evidence in relation to a number of inferences and assumptions he drew from the ASX announcements when deciding whether to invest in GetSwift.

1172 In relation to the CBA Announcement, Mr Vogel gave evidence that he took the 257,400,000 delivery projection figure contained in the announcement as "a number that was not made up, or indicative, or a target".[1916] While he understood that the arrangements between GetSwift and CBA would take months, if not a year or so, to integrate, and therefore the estimated deliveries would not be achieved straight away, he relied upon the estimate as "having underlying substance" and assumed that GetSwift "had a commercial arrangement with CBA that would yield a large number of transactions".[1917]

1173 Similarly, Mr Vogel viewed the Second NAW Announcement as positive, namely because of the "size of the revenue disclosed" which "stood out" to him because of the specific delivery and revenue figures and he assumed that there was some "rigor around the numbers".[1918] He believed that "when a company such as GetSwift discloses a forecast of specific revenue in an ASX Announcement", he could "rely on that forecast as having a basis and … substance".[1919]

1174 Further, Mr Vogel gave evidence that he understood the Yum Announcement to convey that "all brands that fell under Yum! Brands global banner" would at some stage be using the GetSwift software,[1920] and that the deployment would not commence at once in every location but instead "would take time and be introduced in stages across many jurisdictions" and that "any trial by [Yum] had been completed prior to the announcement and that the agreement that had been disclosed in the announcement would have a commercial end point".[1921] Mr Vogel viewed the number of 250,000,000 deliveries annually stated in the Yum Announcement as

[1915] ACS at [1428].
[1916] Vogel Affidavit (GSW.0009.0013.0001_R) at [12].
[1917] Vogel Affidavit (GSW.0009.0013.0001_R) at [12].
[1918] Vogel Affidavit (GSW.0009.0013.0001_R) at [22]–[23].
[1919] Vogel Affidavit (GSW.0009.0013.0001_R) at [23].
[1920] Vogel Affidavit (GSW.0009.0013.0001_R) at [29].
[1921] Vogel Affidavit (GSW.0009.0013.0001_R) at [29].

significant and "assumed that there was rigour around that number", and even though he did not expect the partnership to be "fully integrated from day one, did assume that the reasonably precise figure of estimated annual deliveries would be captured once the software was fully integrated".[1922] He assumed that because the partnership had been announced to the market and contained such specificity in relation to the delivery estimate that a commercial agreement between GetSwift and Yum was in place post-trial phase.[1923]

1175 ASIC submits that these were not just theoretical assumptions drawn by Mr Vogel, but that he relied upon them for the purposes of deciding whether to invest in GetSwift by taking the announcements into account as a basis for the projection of future revenue.[1924] Indeed, Mr Vogel's evidence was that he recommended that Thorney participate in the First Placement on the basis of the information contained in the ASX announcements, the May 2017 investor presentation and a conference call with Mr Hunter and Mr Macdonald.[1925] Mr Vogel gave evidence that his recommendation sought to ascribe a value to GetSwift's shares on the basis of projecting the future revenue he expected would be derived from the announced contracts, including the CBA Agreement and other agreements, discounted for risk.[1926]

1176 Mr Vogel also gave evidence that following the Yum and Amazon ASX Announcements, he prepared a weekly note in which he recorded his valuation of GetSwift on an "unrisked" basis, where he projected the future deliveries and revenue streams from the Yum MSA and NAW Agreements, by reference to his assessment of the price to earnings ratio.[1927] He assessed the "unrisked value" of GetSwift's shares to be $7, and therefore recommended that there be an accumulation of Thorney's investment in GetSwift at $2.10.[1928] Further, in his recommendation that Thorney invest in GetSwift via the Second Placement, Mr Vogel concluded that if GetSwift

[1922] Vogel Affidavit (GSW.0009.0013.0001_R) at [30].
[1923] Vogel Affidavit (GSW.0009.0013.0001_R) at [30].
[1924] ACS at [1418].
[1925] T832.39–42 (Day 11).
[1926] Vogel Affidavit (GSW.0009.0013.0001_R) at [17]–[19]; GSW.1016.0001.0002; T874.23–875.2 (Day 12); GSW.1016.0001.0002; T875.9–25 (Day 12).
[1927] Vogel Affidavit (GSW.0009.0013.0001_R) at [31]; GSW.1016.0001.0005.
[1928] T882.13–15 (Day 12); T883.15–20 (Day 12).

was able to obtain 100% market share of each of the opportunities announced to the market, this would result in a value of $7 per share.[1929]

1177 ***Mr Hall*** gave evidence that he placed reliance upon the NA Williams, Amazon and Yum Announcements when he participated in Fairview's decision as to whether to invest in GetSwift.[1930] He also recalled that other announcements came to his attention while researching GetSwift, including in relation to CBA, Fruit Box and Fantastic Furniture.[1931]

1178 ***Mr Younes*** gave evidence that he relied upon certain ASX announcements to inform his valuation of GetSwift's shares. He said that since the Second NAW Announcement "contained a revenue forecast", he considered it to be the first piece of information that he could "work with as it enabled [him] to model potential future revenue and the value of the company".[1932] Indeed, Mr Younes placed reliance upon this revenue projection as, in his experience, "companies apply rigour in the preparation of such announcements and the announcements are approved by the relevant company's directors".[1933] As a result, he was of the view that "the company considered that there was some certainty regarding the $138,000,000 revenue stream over the five year-period of the agreement forecast in the announcement".[1934]

1179 Further, in relation to the CBA Announcement, Mr Younes regarded the estimated projection of 257,400,000 deliveries and aggregate transaction value of $9 billion as being cumulative over the five year period of the agreement and the revenue target would need to "allow room for error as things may not play out exactly as expected"; however, he did not gain any impression that the GetSwift's product was "subject to any trial period".[1935]

1180 The evidence also reveals that Mr Younes recommended that Fidelity invest in GetSwift.[1936] In making a recommendation, Mr Younes assessed the value of GetSwift's share price based on the NAW Agreement alone, and applied an earnings value to sales multiple of 5, which he

[1929] Vogel Affidavit (GSW.0009.0013.0001_R) at [33]–[34]; GSW.1016.0001.0004; T882.13–15 (Day 12); T883.15–20 (Day 12).
[1930] Hall Affidavit (GSW.0009.0040.0001_R) at [24], and [28].
[1931] Hall Affidavit (GSW.0009.0040.0001_R) at [29].
[1932] Younes Affidavit (GSW.0009.0028.0001_R) at [18].
[1933] Younes Affidavit (GSW.0009.0028.0001_R) at [20].
[1934] Younes Affidavit (GSW.0009.0028.0001_R) at [20].
[1935] Younes Affidavit (GSW.0009.0028.0001_R) at [25]–[26].
[1936] Younes Affidavit (GSW.0009.0028.0001_R) at [49].

regarded as a justifying a share price of $5-$5.50.[1937] He also indicated that he took into account the other contract announcements as a *risk buffer*; that is, he gave no value to the revenue derived from those contracts and instead saw those as "additional upside to compensate for all the risks that [he] knew [Fidelity] would be taking by investing in an early stage company".[1938]

1181 In respect of this aspect of his evidence, during cross-examination, Mr Younes accepted that, in substance, a fair description of his research analysis was that it was "sorely lacking" and "ill-considered".[1939] This was because he applied a value multiple of 5 (somewhat optimistically on par with Microsoft and Oracle) and did not take into account a series of risks relevant to GetSwift, including that it was a newly listed and loss-making enterprise in which the realisation of revenue was subject to significant implementation risk.[1940] However, he refrained from characterising his recommendation as "reckless",[1941] on the basis that he was aware of the risks, including losing the entire amount, and therefore the investment was "couched in those terms".[1942]

1182 ***Ms Howitt*** is a portfolio manager at Fidelity, a role in which she is required to make enquiries of listed companies, speak to company executives, work with investment analysts and maintain responsibility for, and manage, funds.[1943] GetSwift was a company which first came to Ms Howitt's attention during late 2017 when she attended a meeting with GetSwift's directors, which she presumed she had been asked to attend by Mr Younes.[1944] Ms Howitt gave evidence that, following this meeting, she added GetSwift to her "watchlist", which allowed her to monitor the share price and any changes to the company's fundamentals, as well as track the companies' ASX announcements.[1945] During GetSwift's Second Placement in early December

[1937] Younes Affidavit (GSW.0009.0028.0001_R) at [49].
[1938] T796.9–45 (Day 11).
[1939] T794.37–795.17 (Day 11).
[1940] T792.40–794.35 (Day 11).
[1941] T794.4–6 (Day 11).
[1942] T794.25–30 (Day 11).
[1943] Affidavit of Katherine Neisha Howitt affirmed 6 September 2019 (**Howitt Affidavit)** (GSW.0009.0023.0001_R) at [8]–[9].
[1944] Howitt Affidavit (GSW.0009.0023.0001_R) at [10].
[1945] Howitt Affidavit (GSW.0009.0023.0001_R) at [18].

2017, Ms Howitt made the decision, on the recommendation of Mr Younes, that all of the portfolios she managed would participate in the share placement.[1946]

1183 GetSwift mounts a number of attacks on the evidence of the Investor Witnesses.

1184 *First*, GetSwift submits that the Investor Witnesses did not give evidence concerning whether the addition of the omitted information to the impugned announcements would have made a difference to their investment decisions. For this reason, it was said that the evidence of the Investor Witnesses is not relevant to the Court's assessment of materiality and that, in any event, despite the obviousness of the topic to ASICs case, a *Ferrcom* inference should be drawn for the failure to adduce this evidence in chief. GetSwift also made a great deal of the fact that each of the Investor Witnesses attended meetings with GetSwift,[1947] or undertook due diligence, such as speaking with GetSwift's customers or otherwise reviewing other publicly available information.[1948] It is said that ASIC has made no attempt to elicit from the Investor Witnesses whether it was the matters discussed at those meetings that caused them to invest in GetSwift.[1949]

1185 But it is important to recall that the Investor Witnesses were not called as expert witnesses, nor is ASIC required to prove what caused the specific investors to invest. In this sense, their views as to whether the omitted information was material were not particularly relevant nor useful. Rather, the views of the Investor Witnesses are useful (to a limited extent) because they provide some indication of investor expectations, as well as the way in which the stock was valued by the actual investors who recommended GetSwift. But none of this was earth-shattering stuff. The point to be gleaned from the Investor Witnesses' evidence, such as it was, is that their views are consistent with the evidence of Mr Molony (which in turn was consistent with common sense), in that they valued GetSwift's shares by reference to the projected revenue to be derived from the announced contracts and discounted by the perceived risk.

[1946] Howitt Affidavit (GSW.0009.0023.0001_R) at [25].
[1947] Hall Affidavit (GSW.0009.0040.0001_R) at [18]–[23]; T813.1–14 (Day 11); Howitt Affidavit (GSW.0009.0023.0001_R) at [12]–[16]; Vogel Affidavit (GSW.0009.0013.0001_R) at [8]–[9], [13], [16], and [32]; Younes Affidavit (GSW.0009.0028.0001_R) at [29], and [33]–[38]; T784.40–785.35 (Day 11).
[1948] Hall Affidavit (GSW.0009.0040.0001_R) at [30]; T817.14–31 (Day 11); T789.26 (Day 11); T791.8–9 (Day 11); T829.18–832.46 (Day 11); Younes Affidavit (GSW.0009.0028.0001_R) at [32]; T784.1–38 (Day 11).
[1949] GCS at [282].

1186 *Secondly*, GetSwift submits that it is of significance that at the time the Investor Witnesses considered investing in GetSwift, they understood the GetSwift business model and the attendant risks. For example, reliance was placed on the following evidence:

(1) Mr Younes and Mr Vogel each gave evidence that they would have read the description of GetSwift's business model, risk factors and specific risks in the Prospectus;[1950]

(2) Mr Hall knew that GetSwift made its revenue by charging a transaction fee per delivery;[1951]

(3) Mr Younes, Mr Vogel and Ms Howitt were each aware that GetSwift was a relatively new and unproven stock, it was regarded as a small commercial entity relative to other ASX listed companies, it was loss making and had uncertain future revenues, earnings and cash flow, the technology industry was fast moving and highly competitive, and the management of GetSwift were relatively unfamiliar to the market;[1952] and

(4) each of Mr Younes, Ms Howitt and Mr Hall considered GetSwift a "high risk" stock.[1953]

1187 There is no need to repeat what I have already outlined in relation to this contention (at [1133]–[1138]), including as to Mr Younes' evidence about trial periods, the prospect of termination, and Mr Vogel's evidence about similar matters. In this regard, it should be noted that GetSwift did not put to Mr Vogel, Ms Howitt or Mr Hall the matters it put to Mr Younes, and GetSwift asserts, but does not explain, how Mr Younes' evidence could be taken to be representative of the views of the whole class of investors. They certainly did not seem to be behaving idiosyncratically.

1188 *Thirdly*, GetSwift argues that apart from Ms Howitt (who it was said principally relied on Mr Younes' recommendation), none of the Investor Witnesses were decision makers. That submission was developed by reference to the following evidence:

(1) Mr Hall said that when an investment decision is made at Fairview, the usual process is for an investment opinion to be formed by members of the Fairview team. This

[1950] Younes Affidavit (GSW.0009.0028.0001_R) at [14]; T780.4–5 (Day 11); T780.30–781.45 (Day 11); T824.21–39 (Day 11).
[1951] T818.16–17 (Day 11).
[1952] T779.16–43 (Day 11); T801.4–34 (Day 11); T825.33–826.31 (Day 11).
[1953] T779.43 (Day 11); T801.36 (Day 11); T810.36–811.13 (Day 11).

involved discussing the weighting of the portfolio his colleagues and determining a consensus view.[1954] While Mr Hall recalled that his views were "points of discussion", he did not recall the specific discussions with his colleagues of the Fairview investment team (none of whom were called to give evidence).[1955]

(2) Mr Vogel did not make the final decision to invest on behalf of Thorney. The decision was ultimately made by the Chairman, together with an investment committee.[1956] Indeed, Mr Vogel gave evidence that, although the Chairman considered his recommendations, they were ultimately not accepted because other (unstated and unspecified) information was taken into account.[1957]

(3) Similarly, Mr Younes did not make investment decisions but did provide "investment ideas and recommendations".1958 The recommendation he did make with respect to GetSwift, which was relied on by Ms Howitt, was said to be underdeveloped.1959 Reliance was again placed on Mr Younes' acceptance that his research was "sorely lacking" and "ill-considered".1960

(4) While GetSwift accepted that Ms Howitt could be classified as a decision maker, given the state of the research upon which the recommendation was based, namely Mr Younes,[1961] the Court should not be assisted by her evidence.

1189 It was said that in the light of the fact that none of the Investor Witnesses were decision makers (and, even if they were, they relied on an apparently deficient recommendation), their evidence should be given little to no weight.

1190 I disagree. What is apparent from the evidence is that, notwithstanding that the majority of the Investor Witnesses were not the ultimate decision makers, each are members of a sophisticated class, whose recommendations in and of themselves were relevant. Indeed, it does not matter that they did not call the ultimate shots about whether or not to invest. Of course, as ASIC

[1954] Hall Affidavit (GSW.0009.0040.0001_R) at [25].
[1955] Hall Affidavit (GSW.0009.0040.0001_R) at [28]; T816.14–47 (Day 11).
[1956] T823.36–824.13 (Day 11).
[1957] T875.33–40 (Day 12).
[1958] T774.41–775.4 (Day 11).
[1959] T786.16–795.27 (Day 11).
[1960] T794.37–795.17 (Day 11).
[1961] Howitt Affidavit (GSW.0009.0023.0001_R) at [25]; T807.23–808.9 (Day 11).

accepts, these witnesses are not the only investors to whom regard must be had for the purpose of assessing materiality of the omitted information. Yet, in the absence of other evidence, their assessments of particular matters are relevant (at least to some extent) as to how sophisticated investors made decisions or found information to be material. The evidence of these witnesses might not reflect the position of all persons who fall within the class of investors; however, this is not really the point: the relevant class includes large and small, frequent and infrequent, sophisticated and unsophisticated investors: *Grant-Taylor (FC)* (at 423 [115] per Allsop CJ, Gilmour and Beach JJ).

1191 *Fourthly*, GetSwift submits that in any event, of the multiple ASX announcements, Investor Witnesses gave consistent evidence that it was only a select few announcements (namely, the CBA, NAW, Amazon and Yum Announcements) that formed part of the basis of their recommendation to invest in GetSwift.[1962] Therefore, it is said the evidence of the Investor Witnesses, considered in its totality, supports GetSwift's position that the vast majority of the announcements were not considered material to any investment decision.

1192 To my mind, this an overgeneralisation of the evidence. It is true that Mr Vogel, Mr Younes, Ms Howitt and Mr Hall placed weight on the CBA, NAW, Amazon and Yum Announcements in the context of investment recommendations and decisions made in response to the Second Placement. However, as noted above, the Investor Witnesses (especially Mr Vogel, Mr Younes and Ms Howitt) did not disregard the other announcements. Mr Vogel, for instance, continued to monitor closely GetSwift's other announcements from the time of the First Placement.[1963]

1193 *Fifthly*, GetSwift asserted that the unexplained failure by ASIC to call two witnesses, Ms Costa and Mr Barry, should lead to a *Jones v Dunkel* inference. No elaboration was provided as to why this is the case. In any event, I reject this submission. These witnesses were in no party's camp. The case was already too long, involved too many witnesses, and the evidence was not, in any sense, determinative. ASIC is not required to call upon every investor or ultimate decision maker who made an investment decision in GetSwift. Moreover, no relevant inference is available on the evidence, of which the failure to call these two witnesses would go some

[1962] Hall Affidavit (GSW.0009.0040.0001_R) at [13], [27]; T816.14–820.9 (Day 11); Vogel Affidavit (GSW.0009.0013.0001_R) at [34]; Younes Affidavit (GSW.0009.0028.0001_R) at [51]. See also T791.25–41 (Day 11); T796.15–45 (Day 11).
[1963] ASIC Reply at [54]; T876.6–8 (Day 12).

way in fortifying: see *Quintis Ltd (Subject to Deed of Company Arrangement) v Certain Underwriters at Lloyd's London Subscribing to Policy Number B0507N16FA15350* [2021] FCA 19; (2021) 385 ALR 639 (at 703 [256] per Lee J).

1194 In summary, I accept the evidence of the Investor Witnesses, so far as it goes. It at least provides some confirmation as what one would have expected was motivating investors to invest in GetSwift and the lens through which investors viewed how the company was performing and would perform in the future.

1195 With this understanding of how ASIC puts its materiality case, it is necessary to turn to the contentions advanced by GetSwift.

GetSwift's materiality contentions

1196 GetSwift advanced a set of contentions seeking to undermine the common sense approach advocated for by ASIC. With some degree of simplification and amalgamation, the following four contentions were advanced by GetSwift:

(1) Since the ASX announcements did not expressly state the expected benefits to GetSwift, they could not be material, and any qualifying material could equally not be material (**Absence of Quantifiable Benefits Contention**).

(2) The omitted information was not material throughout the "continuing periods" of the pleaded contraventions (Continuing Periods Contention).

(3) The omitted information and any omitted qualifying information could only be material if it had a material impact on the share price (Share Price Contention).

(4) The subjective views of the GetSwift directors are not relevant to the objective question of materiality (**Subjective Views Contention**).

1197 Each of these contentions appears with some frequency throughout GetSwift's submissions in relation to each Enterprise Client. Accordingly, it is convenient to deal with each of these overarching contentions here and avoid (to some extent) unnecessary repetition in respect of each Enterprise Client below.

The Absence of Quantifiable Benefits Contention

1198 GetSwift contends that those ASX announcements that did not include any express statement of the expected benefits to GetSwift (other than the Amazon Announcement) could not be material and therefore any qualifying material could equally not be material.

1199 On this basis, GetSwift submits that ASIC must prove the following:

(1) The benefits the market expected from the individual agreement in issue (discounted for the market's perception of risk) were themselves material; that is, if the market did not expect the benefits to be material, it is not possible for the market to regard any qualifying information in respect of those non-material benefits to itself be material.

(2) In respect of the *Agreement Information* and the *Projection Information*, the difference the Agreement Information and the Projection Information would have made to the benefits the market expected from the individual agreements in issue (discounted for the market's perception of risk) was material. For example, if the market expected $100 in revenue to be generated from an announced agreement, and the disclosure of the omitted information would have led the market to discount that figure leaving an expectation of $80 of revenue, ASIC must show the difference of $20 in revenue would have been perceived as material for the entirety of the alleged contravention.

(3) In respect of the *Termination Information* and the *No Financial Benefit Information*, the benefits the market expected from the individual agreement at issue (discounted for the market's perception of risk) remained material at the time GetSwift is alleged to have become aware of the Termination Information and the No Financial Benefit Information and for the entirety of the period of the alleged contravention.

1200 This approach is said to be premised upon the way in which ASIC pleaded its materiality case.[1964] To illustrate this contention, the following was pleaded in respect of the "Fruit Box Agreement Information" (which I will return to below):

> iv. the Fruit Box Agreement Information was important contextual and qualifying information **relevant to an investor's assessment of the information disclosed in the Fruit Box Announcement**;
>
> v. the Fruit Box Agreement Information would indicate to an investor that **realisation of the benefits of the Fruit Box Agreement by GetSwift was less certain** given that GetSwift was still in a trial period, the Fruit Box Agreement could be terminated at any time in the period up to 7 days prior to the expiration of the trial period and that the 3-year term was conditional on the expiry of the trial period;

[1964] GCS at [186]–[200].

vi. the Fruit Box Agreement Information **would likely raise significant questions for an investor** as to the accuracy of the previous announcements by GetSwift including the Fruit Box Announcement.[1965]

1201 GetSwift submits that particulars (iv) and (vi) are simply insufficient for the purposes of determining materiality: the *former* is premised upon information "relevant to an investor's assessment", which is productive of mere consideration but not a decision to buy or sell; and the *latter* is premised upon raising "significant questions for an investor", which is divorced from the statutory concept of materiality.

1202 This leaves particular (v), the terms of which GetSwift contends cannot rise to the level of materiality unless *first*, the market expected the benefits of the Fruit Box Agreement to themselves be material, and *secondly*, that the difference in certainty as to those benefits that would arise following the disclosure of the omitted information was material.[1966] Framed in this manner, given the particularity of what must be found, GetSwift submits that a "common sense test" cannot readily be applied.[1967] Further, GetSwift contends that such a threshold has not been made out in circumstances where ASIC has not led any direct evidence addressing the expectation of benefits from any given customer agreement and its supposed materiality, or each category of alleged non-disclosed information and its supposed materiality.[1968] This is said to be particularly so in a context where most announcements (with some exceptions) did little more than refer to the existence of the arrangement, and did not include any statement of prediction of the revenue expected to be generated from the arrangement.

1203 While I agree that particulars (iv) and (vi) are pitched at a level that does not reflect the statutory concept of materiality (see *Grant-Taylor (FC)* (at 420 [96] per Allsop CJ, Gilmour and Beach JJ), I nevertheless reject GetSwift's characterisation of what must be proved to satisfy particular (v), and its submission that the pleading renders a common sense approach inapplicable.

1204 *First*, GetSwift fails to deal with the fact that the ASX announcements were not mere press releases posted on a website, or published in a trade journal. They were sent to the ASX for

[1965] 4FASOC at [31] (emphasis added).
[1966] GCS at [193].
[1967] GCS at [202].
[1968] GCS at [201(b)–(c)].

release by the ASX to the market, thereby engendering the expectation that underlies the regulatory framework for the making of such announcements. All but two of the ASX announcements were released as "price sensitive". The two exceptions were the Fantastic Furniture & Betta Homes Announcement and the First NAW Announcement (the latter was shortly superseded by the Second NAW Announcement, which was marked price sensitive).

1205 The operation of the Listing Rules (as clarified by ASX Guidance Note 8) is also relevant to an assessment of investor expectations as to the materiality of the ASX announcements (see above at [1104]). For example, as noted above, Listing Rule 3.1 provides non-exhaustive examples of the type of information that would require disclosure, including "the entry into, variation or termination of a material agreement" as well as GetSwift's Continuous Disclosure Policy and First Quantifiable Announcements Representation. Indeed, GetSwift's own Continuous Disclosure Policy made plain that:

> The Company will immediately notify the market via an announcement to the ASX of any information concerning the Company that a reasonable person would expect to have a material effect on the price of the Company's securities or influence an investment decision on the Company's securities.[1969]

1206 Further, and importantly, the First Quantifiable Announcements Representation stated, "transformative and game changing partnerships would be announced but only when they were *secure, quantifiable and measurable*."[1970]

1207 As such, it seems obvious to me, that the relevant class of investors – both large and small, frequent and infrequent, and sophisticated and unsophisticated (or at the very least, a subset of them) – would have expected a "price sensitive" ASX announcement detailing a new contract to be material. Indeed, the example given by GetSwift in its submissions – that a "price sensitive" contract delivering only $24,000 worth of revenue per year (assuming the enterprise client only had the stated minimum of 10,000 transactions per month at 20 cents per transaction) could hardly be material[1971] – ignores the context within which GetSwift stated that it would make announcements to the market. Further, the figures derived from the alleged example are of little practical relevance. To take just one of the ASX announcements, the "more

[1969] Continuous Disclosure Policy (GSW.0016.0000.0001).
[1970] April 2017 Appendix 4C (GSW.1001.0001.0459) (emphasis added).
[1971] GCS at [197]–[200].

than 7,000,000+" transactions projected over three years in the Fruit Box Announcement, on the same assumptions, would equate to at least $1,400,000 in revenue. This would be viewed by investors as significant to GetSwift in the light of the revenue that GetSwift was generating – in April 2017, GetSwift reported that it received $54,000 in cash receipts from customers for the March quarter and $64,000 in cash receipts for the year to date.[1972]

1208 Indeed, GetSwift does not deal satisfactorily with Mr Molony's evidence that he "would expect an investor would look at GetSwift's revenue very much as a lagged indicator of their performance" (which seems to me to be only applied common sense).[1973] Mr Molony's evidence is consistent with the information GetSwift had been feeding to the market. For example, in its April 2017 Appendix 4C, GetSwift stated:

> A strong pipeline of clients signed up to use GetSwift is continuing to progress through the on-boarding process, and is expected to directly drive transaction volumes and income as GetSwift technology becomes fully integrated and deployed.[1974]

1209 In its FY2017 Annual Report, GetSwift specifically addressed the lag between the commencement of integration of the GetSwift Platform into the client's operations as follows:

> [GetSwift] has signed and continues to sign up a very strong pipeline of clients that are eager to deploy the GetSwift platform. This pipeline is expected to continue to drive accelerated delivery volumes and revenues in the subsequent quarters, with expected quantum spikes manifested in 5-6 months.
>
> …
>
> [GetSwift] expects income and transactions to continue growing as the lag in client onboarding and scale is managed.[1975]

1210 In its October 2017 Appendix 4C, GetSwift also recognised the "lag" between commencing integration and full realisation of benefits:

> For the quarter ended 30 September 2017, the Company delivered a 50% increase in aggregate deliveries and a corresponding increase of 67% in revenue, resulting in $255,073 generated for the quarter.
>
> The increase was largely driven by the ongoing successful integration of GetSwift's

[1972] Although it also reported that $117,138 was generated in the quarter: April 2017 Appendix 4C (GSW.1001.0001.0459).
[1973] T946.21–22 (Day 13).
[1974] April 2017 Appendix 4C (GSW.1001.0001.0459) at 0463.
[1975] FY2017 Annual Report (GSW.1001.0001.0161) at 0167.

SaaS technology into its customer's business operational systems

The Company has signed up a very strong pipeline of clients that are eager to deploy the GetSwift platform. **This pipeline is expected to continue to drive accelerated delivery volumes and revenues in the subsequent quarters, with a quantum spike anticipated in calendar year 2018**.[1976]

1211 Hence, the absence of clearly, readily identifiable, benefits in the ASX announcements does not mean that the announcements (and the omitted information) were not material – they played a pivotal role, particularly in the light of their form (as ASX announcements) and context (the majority being announcements following the Quantifiable Announcements Representation and reflecting the comfort provided in the Continuous Disclosure Policy), in engendering a favourable and relatively concrete perception of how GetSwift's business was performing, the reality of which was far less rosy.

The Continuing Periods Contention

1212 GetSwift argues that ASIC has not engaged with the "continuing time periods" applicable to the contraventions it has pleaded.[1977] It is said that the general availability and materiality of information varied over time and, as such, ASIC must prove the omitted information was material at *all times* during which the information is said to be material. For example, it was said that information might became "stale" over time and the significance of any supposed non-disclosed information may change in view of the changing information that was generally available.

1213 There are two points that appear to flow from GetSwift's Continuing Periods Contention. I will deal with each.

1214 The *first*, said to be applicable to all types of information, is best illustrated by reference to the Fruit Box Agreement Information, which was said to be material from 24 February 2017 until 25 January 2018. During this period, GetSwift highlight that many other announcements were made (including announcements that were not impugned), and various information was released to the market relating to the performance of GetSwift. As a result, it is said that ASIC

[1976] October 2017 Appendix 4C and Third NAW Announcement (GSW.1001.0001.0277) at 0288 (emphasis added).
[1977] GCS at [229]–[232].

needs to address and prove that the Fruit Box Agreement Information was material throughout the entirety of the relevant period having regard to the information generally available throughout that period, and the context in which that assessment must take place differs significantly between the beginning and end of that period.[1978]

1215 This aspect of the Continuing Periods Contention should not be accepted. Insofar as GetSwift's submission concerns ASIC's alleged failure to establish that the pleaded omitted information was not generally available during the relevant continuing periods of the pleaded contraventions, I need not repeat what I said above at [1116]–[1143]. Further, GetSwift's contention that ASIC has not established that the omitted information remained material throughout the contravention periods, including the beginning and ending of that period, may be conveniently addressed by reference to the Aesir Capital Report of December 2017, which provides a useful illustration of the ongoing materiality of the omitted information.

1216 By way of background, GetSwift appointed Aesir Capital as its corporate advisor and as "Sole Lead Manager" in the Second Capital Raising.[1979] Aesir Capital published what I will call the **Aesir Capital Report** in December 2017.

1217 The following passages of the Aesir Capital Report are of particular relevance:

> **Aesir Initiates with a Price Target of A$7.33 which Represents a 50/50 blend of our Comparables (EV/Sales) and Discounted Cash Flow Methodologies for ~200% Upside-** With the current pipeline ramp-up and the NA Williams deal fully deployed, GetSwift should be on track to do ~A$200m revenue comfortably in CY2020. GetSwift's peer universe is richly valued for markedly less growth than GetSwift offers, albeit the companies are significantly more mature in their life cycle. Given GSW's superior growth profile and margin structure, it is fair to assume that it could trade at ~10x EV/Sales based on 2019 sales projections which would equate to $2.06 billion enterprise value ($1.982 billion market cap), resulting in a $9.31/share fair value for the common equity in 2018. To sense-check that number, we used a discount cash flow model with Aesir NOPAT projections to 2022, a terminal growth of 5% and tax rate of 30%. To reflect the high level of execution risk, we opted for a 20% discount rate which results in an NPV/share of $5.34. As a thought exercise, Aesir elected to reverse engineer the share price to see what the implied discount rate the market was assigning to the Company's projected cash flows. Under our assumptions, a 40% discount rate equates to a A$2.40 share price. This suggests that the market is still in 'wait and see' mode with regards to whether the management can fully execute

[1978] GCS at [230].
[1979] GSW.0013.0001.0720; GSWASIC00033949 at 3950; Younes Affidavit (GSW.0009.0028.0001_R) at [28]; Hall Affidavit (GSW.0009.0040.0001_R) at [10].

> on their current contracted deals and more interestingly, the market is attaching zero value to GSW's deal pipeline, including the one other 'embargo deal' that management references in its presentation materials. This represents a substantial opportunity.[1980]

1218 Further, the following was said in the heading "Valuation":

> The Company has issued two pieces of revenue guidance that should be considered. In their May 2017 investor presentation, the company said it was targeting 30x transaction growth in next 24 months and 50x transaction growth in 36 months. That equates to over 72 million transactions per year and over 120 million transactions per year respectively. Assuming 15c/ transaction, that's A$18m/year revenue when ramped up. Those projections were made on their then-current pipeline. Since that guidance GetSwift announced that it has signed an exclusive commercial five-year agreement with N.A. Williams, the leading representative group for the North American Automotive Sector. It is estimated that the contract will potentially yield in excess of 1.15 Billion transactions per year once fully implemented (fulfillment will take 15-19 months due to the complexity of the channel structure). GetSwift expects this deal alone to increase revenue by more than US$138 million per year once all channel partners are online or ~A$180m.

1219 Pausing here, I should note that ASIC and GetSwift has reached divergent conclusions as to the meaning and significance to be attached to the Aesir Capital Report, including the passages above. It is necessary to canvass these issues in some detail before outlining how the Aesir Capital Report provides a useful illustration of ongoing materiality.

1220 GetSwift's primary point of contention is that the conclusion in the Aesir Capital Report, being that the market was not attaching any value to the deal pipeline, directly contradicts ASIC's "expectation" thesis.[1981] It is said that while the Aesir Report referred to how "the platform is growing at an exponential rate",[1982] this statement referred to historical performance (the platform "delivering 375,000 items per month") rather than to expectations of rapid future growth. Indeed, GetSwift points to the fact that the statement was accompanied by a figure labelled "Historical Delivery transactions by Calendar Quarter".[1983] GetSwift also submit that while the Aesir Capital Report did state that it anticipated GetSwift would continue to secure major agreements, in the same sentence, the following warning was proffered: "performance could falter if there are unexpected delays to current timelines".[1984] Finally, GetSwift contends

[1980] Aesir Capital Report (GSW.0013.0001.0822) at 0823 (emphasis in original).
[1981] GCS at [254].
[1982] Aesir Capital Report (GSW.0013.0001.0822) at 0829.
[1983] Aesir Capital Report (GSW.0013.0001.0822) at 0829.
[1984] Aesir Capital Report (GSW.0013.0001.0822) at 0846.

that because its share price at the time was considerably lower than the price target implied by the sales growth assumed in the report (which reflected an upside of 200%), it "follows that consensus market forecasts of future sales growth were considerably lower than the estimates of sales growth utilised in the projections".[1985] To support this proposition, GetSwift emphasised the following passage of the Aesir Capital Report:

> [T]he market is still in 'wait and see' mode with regards to whether the management can fully execute on their current contracted deals and more interestingly, **the market is attaching zero value to GSW's deal pipeline, including the one other 'embargo deal' that management references in its presentation materials.**[1986]

1221 However, the passage fastened upon by GetSwift must be viewed in context. Indeed, GetSwift's submission appears to ignore the immediately preceding parts of the same passage, in which Aesir Capital explains how it had conducted a "reverse engineering" exercise of the $2.40 share price.

> As a thought exercise, **Aesir elected to reverse engineer** the share price to see what the implied discount rate the market was assigning to the Company's projected cash flows. **Under our assumptions**, a 40% discount rate equates to a A$2.40 share price.[1987]

1222 Viewed in context, what this suggests is that Aesir Capital's views were not merely reflective of what the market was doing, but a product of its own "reverse engineering" of the share price.[1988] Therefore, GetSwift's contention that the Aesir Capital Report is directly contrary to the "expectations" thesis cannot be sustained. This is further supported by the fact that the omitted information, in the context of the Aesir Capital Report, would have elucidated the following:

(1) the deal pipeline comprised of clients who had only entered into term sheets to undertake future trials, or agreements that provided for subsequent entry into Service Orders (i.e. Amazon) or SOWs (i.e. Yum);

(2) previously announced contracts were only announcements pertaining to client trials;

(3) some contracts had not proceeded to the trial period at all or would not be proceeding further;

[1985] GCS at [254].
[1986] Aesir Capital Report (GSW.0013.0001.0822) at 0850 (emphasis added).
[1987] Aesir Capital Report (GSW.0013.0001.0822) at 0850 (emphasis added).
[1988] ASIC Reply at [82].

(4) some had resulted in the agreement being terminated; and

(5) some had serious integration or associated issues.

1223 What this demonstrates is the importance of assessing materiality with regard to investor "expectations", given that the omitted information would have not only disclosed to investors that potential benefits to be derived from contracts that had been announced at that point in time were less certain, but that it would undermine investor confidence in earlier announcements.[1989]

1224 Notwithstanding GetSwift's attack as to the meaning and significance to be drawn from the Aesir Capital Report, ASIC assert, and I accept, that the report, including the passages extracted above (at [1217]–[1218]), provide a useful and compelling illustration of why the disclosure of material information, that substantially qualified earlier announcements, would have remained relevant and influenced investors in making their decisions as to whether to acquire or dispose of shares in GetSwift throughout the entire period.[1990]

1225 Indeed, from the passages of the Aesir Capital Report, and upon a fair reading of the whole of that report, as at December 2017, Aesir Capital was operating on the basis that all previously announced contracts provided a basis for projecting future revenues and thereby determining the value of GetSwift shares (after an application of a discount factor for risk). For example, Aesir Capital reported that GetSwift had secured "partners like Commonwealth Bank and NA Williams less than one year after completing their IPO … [i]n contrast, competitors like Bringg and Onfleet have been around longer with more modest contracts".[1991] The Report further stated "[w]hilst other businesses have lost customers to GetSwift over the last year, GetSwift has managed to avoid losing its own clients to competitors"[1992] and that "[w]ith the current pipeline ramp-up and the NA Williams deal fully deployed, GetSwift should be on track to do ~A$200m revenue comfortably in CY2020".[1993]

1226 In the part of the Aesir Capital Report entitled "The GetSwift Story", Aesir Capital marked out for special attention that, since its IPO, GetSwift had signed deals with Fruit Box ("Estimated

[1989] ASIC Reply at [82]–[84].
[1990] ASIC Reply at [89].
[1991] Aesir Capital Report (GSW.0013.0001.0822) at 0822.
[1992] Aesir Capital Report (GSW.0013.0001.0822) at 0823.
[1993] Aesir Capital Report (GSW.0013.0001.0822) at 0823.

to aggregate 7m deliveries"), CBA ("exclusive multi-year partnership signed…Estimated 257m deliveries secured"), Pizza Hut ("Exclusive multi-year contract signed with Pizza Hut, which owns 320 stores in Australia and *15,00 worldwide*"), Hungry Harvest ("Exclusive multi-year contract signed…[with] a fresh produce delivery company operating in 6 US states"), Bareburger ("Exclusive multiyear contract to service 40 restaurants"), Betta Home Living and Fantastic Furniture ("Exclusive multi-year contract, Betta Home Living owns 157 stores across Australia. And Fantastic Furniture owns 75"), NA Williams ("totalling 1.15 billion transactions and $138 million revenue annually when fully implemented") and Johnny Rockets ("operates 350 franchises").[1994] Further, Aesir Capital's valuation of GetSwift relied upon "projections" made on the pipeline of contracts that had been reported by GetSwift.[1995]

1227 The Aesir Capital Report is useful in demonstrating why the disclosure of the material information, which would have substantially qualified earlier announcements, was information which (throughout the entire period) would have remained relevant and influenced an investor in deciding whether to acquire or dispose of GetSwift's shares. When it comes to materiality, overall context is important. The conclusions drawn in the Aesir Capital Report make intuitive sense based on the material that was generally available viewed in its overall *context*, including what had been said in the Prospectus about disclosure.

1228 The *second* aspect of GetSwift's Continuing Periods Contention concerns its submission that there is a temporal dimension to the alleged contraventions that ASIC has not addressed. It is said that ASIC makes continuous disclosure allegations that continue up to the date of the institution of proceeding despite various announcements being released on the ASX, including the following: GetSwift's response to the ASX Aware Query dated 25 January 2018 (see [1055]); GetSwift's Market Update dated 9 February 2018 (see [1056]) GetSwift's Market Update dated 19 February 2018 (see [1057]) (which I have collectively defined as the 2018 ASX Market Update Information),[1996] and media reporting throughout the period.[1997]

[1994] Aesir Capital Report (GSW.0013.0001.0822) at 0824.
[1995] See ACS at [1430]; Aesir Capital Report (GSW.0013.0001.0822) at 0847.
[1996] GCS at [231]–[232].
[1997] See GSW.0003.0004.0001; GSWTB0027; GSWTB0028; GSWTB0029; GSWTB0030; GSWTB0031; GSWTB0035; GSWTB0036.

1229 While it is appropriate to address this part of the contention specifically in respect of each Enterprise Client below, I should foreshadow that, at a general level, I do not consider this submission at all compelling. The statements made by GetSwift in each of these communications is too general in nature to impact upon the importance of the omitted information. By way of example, GetSwift contends that the Johnny Rockets Agreement Information was not material over the period ASIC alleges, given that the 2018 ASX Market Update Information expressly discussed the existence of trial periods.[1998] But one will search in vain for any reference to Johnny Rockets in these Announcements, or for any reference that Johnny Rockets itself was within a trial period.

The Share Price Contention

1230 A significant point of contention between the parties concerns the relevance of GetSwift's share price in the materiality evaluation. It is convenient to first set out the competing positions before turning to the appropriate approach.

1231 ASIC accepts that the materiality of information *may* be assessed by having regard to the actual impact of the information on the share price, which provides a means to "cross-check" the reasonableness of an *ex ante* judgement about a different hypothetical disclosure: see *Fortescue* (at 301 [477] per Gilmour J); *James Hardie* (at 197 [534]–[537] per Spigelman CJ, Beazley and Giles JJA); *Lombe* (at 98 [277] per Foster J). However, the core of ASIC's case is that the rapid increase in GetSwift's share price from $0.20 at its IPO to $4 on 7 December 2017 (and the ultimate fall to $0.52 by 8 December 2018) in the absence of any other apparent factor demonstrates graphically that investor expectations were engendered by the ASX announcements.[1999] This is consistent with Mr Molony's opinion that GetSwift's share price was "event driven" and related to the ASX announcements.[2000] Further, as recognised by Mr Molony, while a number of GetSwift announcements had a material short term impact on GetSwift's share price,[2001] many of the contracts merely supported market expectations at the relevant times; those expectations being that the benefits of the existing contracts would be

[1998] GCS at [919].
[1999] ACS at [1435].
[2000] First Molony Report (GSW.0002.0004.0001_R) at [9].
[2001] Second Molony Report (GSW.0002.0004.0601_R) at [15(c)].

captured by GetSwift and that further contract "wins" were forthcoming.[2002] It is said that given the significance of investor expectations, assessing the impact of individual GetSwift announcements cannot be limited to a consideration of the short term price reaction following a given announcement.[2003]

1232 As might be expected, GetSwift's approach to this issue is the opposite. GetSwift submits that unless ASIC can demonstrate that the ASX announcements had a material impact on the GetSwift share price, its continuous disclosure case must fail because any omitted qualifying information could not be material.[2004] In this sense, GetSwift's mode of analysis is to use the reaction to that which was disclosed (i.e. the ASX announcements) as a "stepping-stone" to consider the likely impact of that which was omitted.[2005] It was argued that, as a "matter of logic", one can infer the reaction to a hypothetical announcement containing the omitted information on the basis of the market reaction to the actual announcement.[2006] That is, where the disclosed information is likely to have a positive effect, while the omitted information is likely to have a partially offsetting or negative effect, if the information that was disclosed did not have a positive material effect, it can be concluded that the omitted information could not have had a material effect on the share price.

1233 To ground this argument, GetSwift relies on Gilmour J's observations in *Fortescue*, which it contends provides "a useful prism for analysis". In that case, while his Honour recognised the approach to assessing materiality was *ex ante*, he did accept (at 301 [477]) the following:

> [E]vidence of the actual effect of the information actually disclosed on [the company's] share price may be relevant to assist the court in its determination of whether s 674(2) has been contravened: *Rivkin Financial Services Ltd v Sofcom Ltd* (2004) 51 ACSR 486; [2004] FCA 1538 by analogy at [113]–[116]; *Jubilee Mines* at [33], [130] and [134]. This involves an ex post inquiry. Such evidence may constitute a relevant cross-check as to the reasonableness of an ex ante judgment about a different hypothetical disclosure.

1234 Applying this line of reasoning to the facts of that case, Gilmour J noted (at 315 [549]):

> [A]n ex ante analysis of the likely influence of the actual notifications followed by an ex ante analysis of the likely influence of the hypothetical information is not the

[2002] Second Molony Report (GSW.0002.0004.0601_R) at [11], and [15c].
[2003] Second Molony Report (GSW.0002.0004.0601_R) at [16].
[2004] GCS at [212]–[266].
[2005] GCS at [224].
[2006] GCS at [227].

> preferred approach. Whether [the company] ought to have announced the hypothetical information following the actual notifications made in August and November, is better informed by **considering, on an ex post basis, the actual effect on the [the company's] share price following the actual announcements and against that market information, and then considering, on an ex ante basis, the s 677 influence, if any, of the hypothetical notifications.**
>
> (Emphasis added).

1235 See also *James Hardie* (at 197 [537] per Spigelman CJ, Beazley and Giles JJA); *Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd* (***Fortescue (FC)***) [2011] FCAFC 19; (2011) 190 FCR 364 (at 424–425 [188] per Keane CJ). Cf. *Grant-Taylor* (at 737 [64] per Perram J).

1236 Since the vast majority of the ASX announcements did not result in a significant impact on GetSwift's share price, even if GetSwift had, in hypothetical terms, qualified the announcements by watering down the anticipated benefits, this would not have resulted in any meaningful change to the share price. Similarly, it is said that if the announcement of a new customer relationship was met with price indifference such that it was not material, then the hypothetical disclosure of the termination of that relationship would have been treated in the same way and therefore could not have been material.

1237 Further, GetSwift submits that for ASIC's claim to hold, it is necessary that a string of agreements similar to those announced were not merely expected, but were expected with a sufficiently high degree of certitude, such that the ASX announcements added nothing of material value to an investor's assessment of the stock and that the subsequent news regarding the actual entry into those agreements did not evoke a material price reaction. Indeed, it was said that not only must investors have been anticipating these partnerships with such a high degree of certitude, they must have also been anticipating any announced partnerships to be already in the revenue generating phase at the time of the announcement. In support of this contention, GetSwift point to how its share price experienced no positive reaction when the May Investor Presentation (which concerned how growth in transactions were consistent with prior estimates of deliveries provided in the CBA Agreement) was released on 9 May 2017.[2007]

[2007] GSW.1001.0001.0562; GCS at [247].

1238 Having considered the detailed submissions on the Share Price Contention, it is clear that ASIC's approach, as outlined above (at [1231]) is to be preferred. A number of reasons support this conclusion. Before turning to these reasons, it is necessary to set out the agreed table which reflects GetSwift's share price following each ASX announcement (which was marked as **Exhibit Y**):

Announcement	Date	Time Announce-ment Released	Closing Price on day prior to Announce-ment	Closing Price	Percentage movement from closing price the day prior to the Announcement to the specified date
FruitBox	24-Feb-17	9:29:42	0.460	0.480	4.3%
	28-Feb-17			0.450	-2.2%
CBA	4-Apr-17	8:26:33	0.490	0.730	49%
Pizza Hut	28-Apr-17	13:28:51	0.675	0.690	2.2%
	1-May-17			0.635	-5.9%
	5-May-17			0.600	-11.1%
All Purpose Trans	8-May-17	11:08:11	0.600	0.620	3.3%
	9-May-17			0.600	0.0%
CITO Transport	22-May-17	9:58:53	0.790	0.850	7.6%
	23-May-17			0.790	0.0%
Hungry Harvest	1-Jun-17	9:28:47	0.830	0.850	2.4%
	7-Jun-17			0.870	4.8%
Betta & Fantastic	23-Aug-17	10:20:43	1.000	1.015	1.5%
	29-Aug-17			1.005	0.5%
Bareburger	30-Aug-17	9:36:38	1.005	1.025	2.0%
NA Williams	12-Sep-17	9:05:18	1.735	2.060	18.7%
	19-Sep-17			1.770	2.0%
Johnny Rockets	25-Oct-17	11:48:14	2.540	2.590	2.0%
	26-Oct-17			2.500	-1.6%
	1-Nov-17			2.440	-3.9%
YUM! Brands	1-Dec-17	9:56:11	1.960	3.600	83.7%
Amazon	1-Dec-17	10:01:11			
	4-Dec-17			4.300	119.4%
Notes:					
Data for the calculations extracted from GSW.0003.0005.0325 – SCD-7 Dent Affidavit (GSW.0009.0039.0001)					

1239 *First*, from the outset, ASIC's case was not pleaded nor opened on the basis that share price was critical to establishing materiality; that is, its case was not dependent upon it proving that

the ASX announcements each had a readily observable and immediate impact on GetSwift's share price. To the extent that GetSwift contends that ASIC has therefore simply ignored inconvenient primary material, such a contention should not be accepted.

1240 *Secondly*, GetSwift's Share Price Contention mischaracterises ASIC's acceptance that looking to fluctuations in share price *may* at times be useful in the materiality assessment, but in this case, such an analysis is not overly helpful, nor in any way conclusive. In the present case, an analysis of share price reaction alone in relation to *disclosed information* does not provide a proper basis for determining the materiality of *omitted information*, which was not disclosed to the market. It offends the basic tenet of how materiality should be assessed by the Court in a continuous disclosure case; that is, on the basis of a common sense approach, which gives consideration to context and takes into account all objective circumstances.

1241 That point was made in *James Hardie*, where in respect of omitted information in that case, the Court of Appeal stated (at 197 [537] per Spigelman CJ, Beazley and Giles JJA):

> We accept that evidence of the market's reaction to the release of information may be relevant as a cross-check in the manner suggested by Gilmour J. However, in this case, [the primary judge's] failure to have regard to the market reaction on 15 May 2003 does not affect the ultimate outcome of the appeal. In the first place, although the share price was relatively stable, there was a significant increase in the volume of share trading … Given the proximity in time to the public release of the information, the inference is that the market reacted to the information. Second, there is an issue as to whether such disclosure as was made on 15 May 2003 satisfied [the company's] statutory obligation … if there was no disclosure on 15 May 2003 that satisfied the statutory requirements, the trading results on that day and the immediately succeeding days would not be relevant in any event.

1242 In that case, the materiality of the omitted information was not dependent upon share price reaction, but rather, on an application of a common sense approach to whether the omitted information was material in the context of James Hardie's business at that point in time: *James Hardie* (at 197–198 [537]–[540]). Similarly, in *Vocation*, it was found that the omitted information was material without an analysis of the actual impact of the disclosed information on share price, but with the assistance of an expert, much like in this case, who expressed opinions on the types of information that were important to investors: see *Vocation* (at 286–290 [531]–[549]).

1243 Indeed, while subsequent authorities have generally endorsed the approach of Gilmour J, they have been cognisant of its limitations. For example, in *Fortescue (FC)*, Keane CJ made plain (at 424–425 [188]) that "the terms of s 677 do not invite an inquiry as to whether any change in the price of securities has occurred". In saying this, it is important to highlight that I am not

rejecting the "useful prism for analysis" that GetSwift draws upon from *Fortescue*. In certain circumstances, on the current authorities, the materiality of information *may* be partly informed by reference to an *ex post* analysis of the actual impact of the information on the company's share price; but this is one factor, which may or may not be relevant in the overall common sense evaluation.

1244 *Thirdly*, while GetSwift places an intense focus on share price for the most part of its case, in respect of those announcements that elicited a significant share price reaction, it simply contends that a "further analysis" is required. This "have your cake and eat it too" approach, or as ASIC puts it, "idiosyncratic and selective approach" – focussing on share price as essentially definitive to then requiring consideration of other circumstances when the share price has altered following an announcement – is inadequate.[2008] Two examples demonstrate this shortcoming: *first*, in respect of the NAW Announcements, GetSwift acknowledges that these announcements "had an immediate effect on the share price",[2009] but nonetheless proceed to focus the enquiry on the share price five trading days after the announcement,[2010] a seemingly arbitrary and selective cut-off, particularly in the absence of any expert analysis to demonstrate that this timeframe is appropriate; and *secondly*, in respect of the CBA Announcement, which had a significant impact on share price, GetSwift contended that the qualifications and limitations to the CBA Deliveries Projection (indicating that there were to be over 257,400,000 deliveries) and the CBA Value Projection (an aggregated transaction value of $9 billion) would not have been material; a conclusion which appears to be based on its own subjective assessment.[2011]

1245 *Fourthly*, in relation to the dramatic fall in GetSwift's share price in February 2018, GetSwift contends that nothing can be inferred in relation to materiality and that there is no "link" between the omitted information and the share price decline. Support for this contention is drawn from the fact that during the month-long trading halt that began on 22 January 2018, the *Australian Financial Review* (**AFR**) published two articles regarding GetSwift: one on 2 February 2018 concerning the class action (**Class Action Article**); and another which

[2008] ASIC Reply at [65(g)].
[2009] GCS at [983].
[2010] GCS at [983(d)].
[2011] ASIC Reply at [59].

"estimated measurable damages could be about $300 million" (**Damages Article**). GetSwift contends that these articles caused the substantial impact on its share price. Further, GetSwift highlight that there was negative news that people were openly shorting the stock (although GetSwift did not cite any evidence in support of this contention beyond the two articles) and that GetSwift released numerous ASX announcements unrelated to the issues in this case, including an Appendix 4C (although GetSwift did not identify significance of these announcements relative to the information that was known beforehand). In the light of this body of confounding information, GetSwift says that it is not possible to establish any link between the share price decline that followed after GetSwift came out of a month-long trading halt and the materiality of any information at issue in this case.[2012]

1246 With respect, these submissions are wholly unpersuasive. The dramatic fall in GetSwift's share price is consistent with Mr Molony's compelling opinion that GetSwift's share price was "event driven".[2013] Indeed, as Mr Molony opined, and I accept:

> a major driver of this decline in the GetSwift share price was due to many investors significantly discounting the likelihood that GetSwift would capture the stated benefits of the previously announced contracts with Fruit Box, CBA, Pizza Pan, APT, CITO, Hungry Harvest, Fantastic Furniture, Betta Homes, NAW, Johnny Rockets, Yum and Amazon.[2014]

1247 Of course, news that a company might be on the hook for damages of about $300 million is likely to impact upon its share price adversely, particularly in the wake of a month long trading halt. But, as Mr Molony highlights, there were far greater underlying concerns: the idea that GetSwift was simply not as it once seemed, GetSwift agreements with Enterprise Clients were marred with uncertainty, and the promises GetSwift presented to the market were looking somewhat empty.

1248 *Fifthly*, ASIC demonstrated that the share price data combined with the traded volume data indicates that the ASX announcements had a twofold impact: *first*, they each caused an increase in the GetSwift share price (although it concedes that this was of very different magnitudes); and *secondly*, they each produced an increase in the volume of shares traded. On the final day

[2012] GCS at [258]–[259].
[2013] First Molony Report (GSW.0002.0004.0001_R) at [9].
[2014] First Molony Report (GSW.0002.0004.0001_R) at [16].

of hearing, the parties agreed on a document summarising different calculations concerning trading volumes (which I marked **Exhibit X**), which appears at the Annexure to these reasons.[2015] Without descending into the detail of the calculations, what the table demonstrates, in the broad, is that in the majority of cases, there was an increase in the volume of shares traded on the day of an ASX announcements. ASIC submits that volume data can therefore provide some assistance in assessing materiality, particularly when looked at "as a whole".[2016]

1249 GetSwift contends, unsurprisingly, that volume data is not useful and not helpful in drawing any conclusion that the expected benefits from the relevant announcements were material.[2017] The following submissions are advanced:

(1) ASIC's approach to volume data is "arbitrary", given that it disregards the volume of trading that occurred on days *after* the day of the relevant announcement. GetSwift contends that such data should be contrasted with the average and median volumes calculated across the whole of the relevant period relevant to this proceeding (i.e. until 19 February 2018), from which GetSwift contends that the announcement day trading volumes generally did not exceed the average volume over that period (although it continues to advance a selective approach to the issue by saying that one must leave aside the days of the CBA, NA Williams, Yum and Amazon Announcements).[2018]

(2) On days when there were no announcements made, there were significant fluctuations in the volume of trading in GetSwift's shares of the same magnitude to those that occurred on the days of the relevant announcements.[2019] For example, between 28 and 29 March 2017, there was an increase of 791% in the volume of GetSwift shares traded, although no announcement was made on either day. Between 15 and 16 November 2017, there was an increase of 396% in the volume of GetSwift shares traded, despite no announcement made on either day. To similar effect, GetSwift highlights that there were a number of days when, despite not releasing an ASX announcement, the volume

[2015] ASIC Reply at [70]; GSW.0003.0005.0325.
[2016] T1216.1–4.
[2017] See GetSwift's Accompanying Note to ASIC's Table of GetSwift Trading Data.
[2018] See also T2233.33–1123.4.
[2019] See also T1111.11–21.

of trading in GetSwift shares was high. On 24 July 2017, there were 2,363,867 GetSwift shares traded; on 16 November 2017, there were 2,874,088 GetSwift shares traded.

(3) Given the number of GetSwift shares increased over the relevant period, the inclusion of trading days prior to when the number of shares on issue increased has the effect of lowering the average and median trading volumes.

(4) Being a speculative stock, GetSwift is subject to a greater than usual proportion of high frequency traders, speculators and day traders, who had the effect of affecting trading volume figures significantly. It was said that these traders are not relevant to the materiality test: see Vocation (at 291 [553] per Nicholas J).

(5) Given a "median is a statistical measurement that is useful for showing what the typical observation in a sample is, unaffected by the weighting effect that outliers can have on the average", and in circumstances where GetSwift's daily trading volumes were volatile, any assessment should use average volume to incorporate the volatility of the data and the randomness of high and low volume days.

(6) While trading volume data may be of some relevance, from the wording of s 674(2) of the *Corporations Act* and Listing Rule 3.1 indicates the focus of the materiality test is on share price.

1250 Based on these submissions, GetSwift says that any volume data on which ASIC relies is not capable of establishing materiality. While there are limitations in the data as identified by GetSwift, it ultimately does not really matter, given trading volume data are but an indication, like price reaction. Indeed, ASIC does not seem to rely on volume data in their submissions. What this analysis of trading data coincident with an ASX announcement does serve to reinforce, however, is that it is not *inconsistent with* the conclusions I would otherwise have drawn in relation to the materiality of the announcements (being conclusions which are, in turn, of some assistance in assessing the materiality of the omitted information). In this sense the trading data operate as no more than a cross-check of the *ex ante* common sense analysis required as to the omitted information. If the data were manifestly inconsistent with any suggestion of materiality of the announcements, it would give reason for pause and further consideration, but that is not the case (and in some respects, such as the CBA, NA Williams, Yum and Amazon Announcements, it is plainly what one would expect to find if the relevant announcement was highly material).

1251 *Sixthly*, GetSwift's claim that ASIC's expectation thesis requires a finding that a string of announcements were expected with a high degree of certitude, such that the announcements added nothing of material value to an investor's assessment of the stock, falls down because that is precisely what was engendered by the Prospectus, the Quantifiable Announcement Representations, and GetSwift's other statements as to impending contract announcements (as set out at [25]–[27] and [31]–[33]). Further, all this occurred in the context of a well-publicised high growth and expansion strategy. It is therefore unremarkable that GetSwift's share price was not directly correlative with the announcements of new agreements: investors had an expectation of actual concluded contracts being announced because that is what they were told would happen, and they were told that these would be announced imminently. As Mr Molony opined:

> [A]ssessing the impact of individual GetSwift announcements **cannot be limited to a consideration of the short-term share price reaction following the given announcement**. In simple terms many of GetSwift new contract announcements **merely supported market expectations** at the relevant time i.e. that the benefits of the existing contracts would be captured by GetSwift and that further contract win announcements were forthcoming.[2020]

1252 Within this context, if GetSwift released a subsequent announcement that told investors the true position was that, in reality, the contract to be announced was a mere term sheet, that the client had not yet commenced a trial (or had not yet concluded a trial), that if the agreement was terminated during the trial period GetSwift lost exclusivity, and that no revenue would be generated until the trial was competed, as a matter of common sense, of course such information would have altered the engendered expectation of investors in deciding whether to acquire or dispose GetSwift shares. It may well have also undermined the degree of confidence investors held in the accuracy and reliability of GetSwift's other announcements. But this is not what happened.

1253 Further, I reject GetSwift's submission that its share price experienced no positive reaction when the May Investor Presentation (which concerned how growth in transactions were consistent with prior estimates of deliveries provided in the CBA Agreement) was released on

[2020] Second Molony Report (GSW.0002.0004.0601_R) at [11].

9 May 2017.[2021] *First*, there was in fact a 32% increase in GetSwift's share price in the three days following its release.[2022] *Secondly*, and in any event, the May Investor Presentation informed investors of the number of deliveries that were then occurring, reinforcing what investors had been told and leaving them to believe that those contracts which had been announced to date were generating the level of deliveries estimated.

1254 Investors were also told what was expected in the future pipeline for deliveries in the next 18 to 24 months, engendering an expectation that any announced contracts would convert projections into actuality. Indeed, within this context, a subsequent contract announcement would have been in line with that expectation and, accordingly, if there was no positive movement in the share price following such an announcement, it could suggest the announcement accorded with existing expectations. In saying this, as GetSwift points out, if an announcement was made that significantly added to expectations as to projected volumes, it is likely that it would alter expectations and potentially have an impact on share price.[2023] The CBA Announcement did just that (see below at [1357]), which is understandable given the exponential rate of growth that was expected as a result of the projections made in that announcement.

1255 All of these considerations show the limitations in using share price as a singular and determinative factor to assess the materiality of omitted information.[2024]

1256 *Finally*, and importantly, there are a number of other fundamental issues that exist in relation to GetSwift's approach to share price which, from a common sense market analysis point of view, was somewhat superficial. For example, GetSwift has: (a) not accounted for any macro-market or economic factors on each applicable trading day; (b) only looked to share price, without regard to liquidity, trading volumes, pre-open bid, ask and sell prices or average closing prices; (c) focussed on the closing price, as opposed to intra-day highs in the share price; (d) ignored the potential effect on the share price on other price sensitive announcements on

[2021] GSW.1001.0001.0562; GCS at [247].
[2022] ASIC Reply at [78]; GSW.0003.0005.0325 at 3.
[2023] ASIC Reply at [78]–[81].
[2024] ASIC Reply at [78]–[81].

the day of, or closely proceeding or following the announcements (i.e. Appendix 4C & Quarterly Review Announcement); and (e) did not assess market capitalisation.[2025]

The Subjective Views Contention

1257 The final contention advanced by GetSwift is that the "subjective views" of its directors are mere "musings" and "hardly relevant" to the objective question of materiality. Indeed, it is said that the various emails relating to Mr Hunter and Mr Macdonald expressing their subjective "musings" as to how releasing and timing the ASX announcements could engender, reinforce and foster investor expectations does not address the materiality of the omitted information, which is to be assessed in an objective manner.[2026]

1258 Of course, this is correct; however, it is not without qualification. It is trite to record that materiality is an objective test: *James Hardie* (at 195 [527] per Spigelman CJ, Beazley and Giles JJA). In saying this, the authorities accept that the views of management are relevant, but are in no way determinative: *James Hardie* (at 161 [349], 183 [454] and 195 [527] per Spigelman CJ, Beazley and Giles JJA); *Citigroup Global Markets* (at 106 [546] per Jacobson J). Indeed, any weight to be attached to these subjective views is dependent on the objective basis upon which those views are formed. As the Court of Appeal observed in *James Hardie* (at 183 [454] per Spigelman CJ, Beazley and Giles JJA):

> [T]he statutory obligation to disclose involves an objective test … Therefore, the views of a company's senior management or its directors cannot determine whether disclosure of any given information is required. **That is not to say that the views of those who make the decision as to disclosure may not be relevant. For example, if there was particular information that informed the decision-making of management, such information may be relevant to the determination of whether or not, objectively determined, disclosure was required.** However, the ultimate decision of management or the directors to the disclosure or not of information is not determinative.
>
> (Emphasis added).

Conclusions on the proper approach to materiality in this case

1259 Having examined each of GetSwift's contentions, one might have thought the conclusion was apparent from the beginning: the test for materiality is one of common sense. That is, it

[2025] ASIC Reply at [66].
[2026] GCS at [287]–[290].

demands an appreciation of the broader context, investor experience and intuitive realism. In making sense of it all, it is appropriate to conclude this section with a brief summary of the principles applicable to an assessment of materiality as they relate to the current proceeding.

1260 *First,* I do not regard the absence of clearly, readily identifiable, benefits in the ASX announcements to mean that the announcements (and the omitted information) were not material. As discussed above, the ASX announcements played a pivotal role in engendering the expectations of investors as to how GetSwift's business was performing, particularly in the light of their form (as almost invariably as "price sensitive" ASX announcements) and context (reflecting the comfort provided in the Continuous Disclosure Policy and the assurances given in the Quantifiable Announcement Representations).

1261 *Secondly,* it is not detrimental to ASIC's case that most of GetSwift's new contract announcements did not have a material short term impact on the share price. As the preceding analysis has made clear, assessing GetSwift's share price fluctuations is only one of the relevant factors in determining whether s 674(2) has been contravened. It cannot be determinative of the materiality question and must only constitute a cross-check as to the reasonableness of an *ex ante* judgement about a different hypothetical disclosure: *Fortescue* (at 301 [477] per Gilmour J), cited with approval in *James Hardie* (at 197 [534]–[535] per Spigelman CJ, Beazley and Giles JJA).

1262 *Thirdly,* the significance of the ASX announcements cannot be viewed in isolation. Dissecting each announcement with a scalpel diminishes the cumulative contextual image that was being presented to the market; that is, GetSwift's growth strategy was working, new contracts were being secured, and there was not a sign of failure in sight. That they had this objective effect is unsurprising; after all, this was the whole point of GetSwift's public-relations driven approach so evident in the repeated admonitions of Mr Hunter to others to ensure the generation of publicity as to the price sensitive character for the announcements.

1263 *Fourthly,* it goes without saying that omitted and material information can become known at a later stage, and this will, in most circumstances, bring an end to the contravention. But for this to be the case there must be specificity. As the discussion with respect to each Enterprise Client below will demonstrate, while announcements were made qualifying the nature of GetSwift's engagements with its Enterprise Clients, this was done at a high level of generality, and almost always couched in non-definitive terms.

1264 *Finally*, the subjective motivations of the directors as to how timing and releasing the ASX announcements could engender, reinforce and foster investor expectations are not determinative. However, they should not be immediately dismissed as mere musings and may be of some (albeit limited) relevance to the extent they shed light on the objective basis upon which those views were formed.

H.3 The Enterprise Clients

1265 With a conceptual understanding of ASIC's continuous disclosure case in mind, it is necessary to turn to make specific findings in relation to each of the pleaded categories of omitted information as they relate to each Enterprise Client.

1266 As will become evident in respect of the general availability and materiality elements of ASIC's case, GetSwift pursues its Perpetually on Trial and Terminable at Will Contention, Absence of Quantifiable Benefits Contention, Continuing Periods Contention and Share Price Contention with relentless repetition. For reasons I have already explained above, each of these contentions misconceives the proper approach that I should adopt in this case. Regrettably, however, despite disposing of these submissions at an overarching level, at times, it is necessary to return to them as they apply to each Enterprise Client.

1267 Once again, for those who prefer to see where the rubber hits the road in respect of a particular category of the omitted information, reference can be made to the table above at [1064].

H.3.1 *Fruit Box*

1268 ASIC's case in respect of Fruit Box concerns GetSwift, Mr Hunter, Mr Macdonald and Mr Eagle.

Fruit Box Agreement

1269 On 21 February 2017, Fruit Box signed the Fruit Box Agreement with GetSwift: see [160]. The material terms of the Fruit Box Agreement were that: (a) there was a trial period, described as a "limited roll out" period, ending on 1 April 2017; (b) Fruit Box was permitted to terminate the agreement at any time in the period up to seven days prior to the expiration of the trial period, by giving notice in writing; and (c) if such notice was given, the three-year term of the agreement would not commence and Fruit Box would not be obliged to use GetSwift exclusively for its last-mile delivery services.

Fruit Box Announcement

1270 It was common ground among the defendants (with the exception of Mr Eagle) that on 24 February 2017, GetSwift submitted the Fruit Box Announcement to the ASX entitled "GetSwift signs The Fruit Box Group (Box Corporate) to a 3 year, 7M+ deliveries contract": see [170].[2027] Each of the defendants admits that the Fruit Box Announcement stated: (a) GetSwift had signed a three year exclusive contract with Fruit Box; (b) Fruit Box currently managed over 1,500,000+ deliveries every year with significant growth projections in place; and (c) the "exclusive contract" with Fruit Box was projected at more than 7,000,000+ total aggregate deliveries (**Fruit Box Projection**).[2028]

1271 The ASX released the Fruit Box Announcement as "price sensitive", following Mr Hunter and Mr Macdonald instructing Mr Mison to mark the announcement as "earning/commercially pertinent" and "price sensitive" respectively: see [164]–[169]. Further, Mr Hunter, Mr Macdonald and Mr Eagle each received email confirmation from Mr Mison on 24 February 2017 that the Fruit Box Announcement had been submitted to, and released by, the ASX (which attached the final copy of the ASX announcement): see [171].

1272 While, to my mind, the receipt of Mr Mison's email and its attachments gives clear indication that each of the directors had knowledge that GetSwift had submitted the Fruit Box Announcement to the ASX and were aware of the content of that announcement, this was somewhat curiously put in contest. I will deal with each of the directors' submissions in turn.

1273 Mr Hunter's submissions are twofold. *First*, he contends that he was only involved in preparing an earlier draft of the Fruit Box Announcement, which provided a projection of "more than 6,000,000 deliveries" over the three year contract period: see [161]. Mr Hunter submits that there is no evidence of him approving the final form of the Fruit Box Announcement, which had a revised figure of "more than 7,000,000" deliveries, save as to the extent that "such approval could be inferred from Mr Hunter's silence in response to Mr Macdonald's revised draft of the Fruit Box Announcement."[2029] *Secondly*, Mr Hunter argues that if his silence

[2027] Defences at [27].
[2028] Defences at [28].
[2029] HCS at [69]–[75].

constitutes approval, then Mr Eagle's silence must be treated similarly; that is, it was reasonable for Mr Hunter to treat silence on the part of Mr Eagle as Mr Eagle's approval of the relevant announcement.[2030]

1274 These submissions should be rejected. *First*, while Mr Hunter may not have expressly approved the final form of the Fruit Box Announcement, to the extent that Mr Hunter was not involved in amending the final figure, it is evident that he would have had knowledge of that figure when he received Mr Macdonald's email of 23 February 2017 attaching a revised draft, which relevantly contained the new figure of "more than 7,000,000": see [164]. Further, in circumstances where there is overwhelming evidence of Mr Hunter exercising extensive control over the release of announcements to the ASX, his silence is consistent with his approval of its contents. For example, following Mr Macdonald's email of 23 February 2017, Mr Hunter replied, demanding: "Make sure it's marked as earnings/commercially pertinent (red !)": see [164]. *Secondly*, the comparative reference to Mr Eagle's silence does not assist Mr Hunter at all. As will become evident in these reasons, the two directors had entirely different roles in relation to the control and approval of the ASX announcements. It would be misconceived to approach (and draw any inference from) the silence of Mr Hunter in the same way as the silence of Mr Eagle. Any such inferential reasoning must be approached contextually, including by reference to the different roles and attitudes of the two men as to company announcements, as revealed by the material in evidence. I should further note that Mr Hunter admitted that he contributed to the drafting of the Fruit Box Announcement.[2031]

1275 Mr Macdonald submits that because he was not included in the email chain between Mr Mison and Mr Eagle, there is no evidence to suggest that he was made aware of Mr Eagle's comments regarding the inclusion of the 7,000,000 figure: see [165].[2032] Similarly, Mr Eagle appears to submit that he did not approve the Fruit Box Announcement and that the comments he provided to Mr Mison demonstrate the totality of his knowledge about what was contained in the email and its attachments.[2033] These submissions must be rejected. Mr Macdonald and Mr Eagle were

[2030] HCS at [76].
[2031] Defences at [347(a)].
[2032] MCS at [146].
[2033] ECS at [161].

each actively involved in the preparation and authorisation of the Fruit Box Announcement to the ASX. Mr Macdonald admitted that he directed and authorised the transmission of the Fruit Box Announcement to the ASX (see [164]),[2034] and Mr Eagle reviewed and commented on a draft of the Fruit Box Announcement the night before it was released (see [164]–[168]), although I am not entirely convinced that Mr Eagle "settled" the content of the announcement, which was the language used by ASIC in its closing submissions.[2035] In these circumstances, it is artificial to say that Mr Macdonald, Mr Eagle, or Mr Hunter would not have been aware of the final content of the Fruit Box Announcement, particularly in circumstances where they were each sent the final version from Mr Mison: see [171].

1276 While I have engaged in this somewhat artificial analysis of the knowledge of each of the directors in relation to the Fruit Box Announcement, to avoid repetition, I will not do so in respect of the other Enterprise Clients. Unless some idiosyncratic issue arises, I am satisfied that where the directors received a copy of the relevant announcement in its final form as submitted to, or released by, the ASX, they had knowledge of the content of the final form of the announcement. Indeed, in the absence of evidence to the contrary, it is reasonable to expect that directors of a publicly listed company would, at the very least, review the final announcement that had been released to the ASX.

Fruit Box Agreement Information

Existence

1277 At the time of the Fruit Box Announcement on 24 February 2017, ASIC alleged, and it was admitted,[2036] that the following factual circumstances existed: (a) the Fruit Box Agreement contained a trial period, described in the agreement as a "limited roll out" period, ending on 1 April 2017; (b) the parties were still within the trial period; (c) Fruit Box was permitted, at any time in the period up to seven days prior to the expiration of the trial period, to terminate the Fruit Box Agreement by giving notice in writing; and (d) if such notice was given, the three-year term of the Fruit Box Agreement would not commence and Fruit Box would not be obliged

[2034] Defences at [271(a)(i)].
[2035] ECS at [155]–[156]; ACS at [212].
[2036] 4FASOC at [28]; Defences at [28].

to use GetSwift exclusively for its last-mile delivery services (collectively, the **Fruit Box Agreement Information**).

Awareness

1278 GetSwift admitted it was aware of the Fruit Box Agreement Information.[2037] Moreover, the evidence establishes that Mr Hunter and Mr Macdonald were each involved in negotiating the Fruit Box Agreement: see [146]–[160]. As such, each would have had knowledge of the contents of the Fruit Box Agreement, including the Fruit Box Agreement Information. I am satisfied that each of Mr Hunter and Mr Macdonald was aware of the Fruit Box Agreement Information as at 24 February 2017.

1279 In respect of Mr Eagle, I accept his submission that there is no evidence he was sent a version of the Fruit Box Agreement earlier than 20 March 2017, which is the date on which Mr Macdonald sent an email to him, attaching the Fruit Box Agreement: see [188]. From this time, I am satisfied Mr Eagle had knowledge of the Fruit Box Agreement Information. For reasons that seem to be based on a conservative approach to proving his accessorial liability as will become evident below, ASIC's complaint in respect of Mr Eagle begins on 27 March 2017.[2038] Consistently with the pleaded case, I am satisfied Mr Eagle had knowledge of the Fruit Box Agreement Information as of 27 March 2017, on the basis that he had received a copy of the Fruit Box Agreement a week earlier.

General availability

1280 The submissions that were advanced as to the generally availability of factual circumstances (a) and (b) of the Fruit Box Agreement Information, which concerned information as to the trial period, were discussed above: see [1117]–[1141].[2039] I am satisfied that these elements of the Fruit Box Agreement Information were not generally available, in the light of my discussion and overarching findings above, given that investors would not have deduced that the Fruit Box Agreement contained a trial period or that the parties were still within the trial period: see [1117]–[1141].

[2037] GCS at [309].
[2038] 4FASOC at [323(a)(ii)].
[2039] MCS at [157]–[159]; HCS at [83].

1281 GetSwift contends that factual circumstances (c) and (d) of the Fruit Box Agreement Information were, in substance, generally available from the Prospectus,[2040] which stated that Enterprise Clients could terminate contracts at will at any time (which necessarily includes any time during the trial for which the agreement provided). GetSwift says that it necessarily follows from this that, if Fruit Box terminated the Fruit Box Agreement, any term of the agreement that had not yet commenced would never commence and Fruit Box would not be obliged to use GetSwift exclusively for its last-mile delivery services.[2041]

1282 Having regard to my discussion above as to the general availability of the Agreement Information and my rejection of GetSwift's Perpetually on Trial and Terminable at Will Contention (see [1117]–[1141]), I find that factual circumstances (c) and (d) of the Fruit Box Agreement information were not generally available. When the Prospectus is considered in its totality and in the light of the contents the Agreement After Trial Representations and later, the Quantifiable Announcements Representations, it is unrealistic to assume that investors would have deduced that the Fruit Box Agreement was subject to a trial period or capable of being terminated prior to the expiry of the trial period.

Materiality

1283 Having already discussed, and in many ways disposed of, the way in which GetSwift has sought to argue materiality (see [1196]–[1258]), it is only necessary to set out, in brief, GetSwift's specific submissions in respect of the Fruit Box Agreement Information.

1284 *First*, GetSwift relies upon the share price trading data to indicate that the announcement of the Fruit Box Agreement was not material.[2042] For example, on the day of the announcement, GetSwift's share price closed at $0.48, a 4.3% increase on the previous day. Two days later, GetSwift closed at $0.45, less than the pre-announcement price.[2043] It is said that the share price points "compellingly" against a finding that Fruit Box Announcement was material.[2044]

[2040] Prospectus (GSW.1001.0001.0478) at 0522.
[2041] GCS at [310].
[2042] GCS at [314].
[2043] GSW.0003.0005.0325 at 2.
[2044] GCS at [315].

1285 *Secondly*, GetSwift contends that the Fruit Box Announcement did not include any clear, express statement regarding the expected benefits to GetSwift from the Fruit Box Agreement. In particular, it is said that the announcement did not include any statement regarding the expected impact of the agreement on GetSwift's revenue or profit. Moreover, since the market was aware of the uncertainties and risks of GetSwift's business model (namely its pay-per-use model and clients being able to terminate at will), it is said that it is likely the benefits that the market thought *might* flow to GetSwift from the Fruit Box Agreement were significantly discounted for such risks. Indeed, GetSwift submits that ASIC has not established that the benefits the market expected were themselves material and even if the benefits of the agreement were said to be material, it could not have regarded the qualifying information (i.e. the Fruit Box Agreement Information) as material, or that the application of any increased discount to those expected benefits would have been material to the price or value of GetSwift's shares.[2045]

1286 *Thirdly,* GetSwift argues that ASIC has not proved that the Fruit Box Agreement Information was material throughout the entirety of the relevant period, namely 24 February 2017 to 25 January 2018.[2046]

1287 As would be evident, these submissions represent particular manifestations of the contentions addressed above: see [1196]–[1258].

1288 The *first* contention is a repetition of GetSwift's Share Price Contention. While it is evident GetSwift experienced a relatively subdued impact on its share price following the Fruit Box Announcement, as I have highlighted, this is only one factor in determining whether on an *ex ante* basis, the Fruit Box Agreement Information was material.

1289 The *second* submission, which is redolent of GetSwift's Absence of Quantifiable Benefits and Perpetually on Trial and Terminable at Will Contention, should also be rejected. As I explained above, these contentions do not provide a complete answer. Moreover, contrary to GetSwift's submission that there was no express statement as to the expected benefits, the Fruit Box Announcement did make statements as to the number of deliveries that Fruit Box currently

[2045] GCS at [316]–[318].
[2046] GCS at [319].

made per year (together with a reference to a projected figure of "7,000,000+ total aggregate deliveries").

1290 The *third* submission is a particular reprise of the Continuing Periods Contention. It suffices to say, I am satisfied that notwithstanding the fact that the Fruit Box Announcement was the first of many impugned announcements, including announcements as to GetSwift's performance, the omitted Fruit Box Agreement Information remained material throughout the entire period of contravention. The Aesir Capital Report, which I discussed earlier, supports this conclusion: see [1216]–[1227].

1291 The Fruit Box Agreement Information was important contextual and qualifying information when viewed in the light of the "price sensitive" Fruit Box Announcement, which engendered and reinforced an expectation among investors that GetSwift had entered into a three-year exclusive contract which would generate future revenue (subject to those risks and matters identified in the Prospectus). Indeed, the Fruit Box Agreement Information would have indicated to an ordinary investor that the benefits of the Fruit Box Agreement were significantly less certain given Fruit Box: (a) had not completed a trial period; and (b) could terminate the agreement such that the exclusivity period referred to in the Fruit Box Announcement would not materialise. I regard such information to have been important to the relevant class of investors when making an assessment of whether to acquire or dispose of shares in GetSwift; of course, bearing in mind that GetSwift was an inherently risky investment.[2047]

Conclusion

1292 I find that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Fruit Box Agreement Information in the period on and from 24 February 2017 until 25 January 2018.

Fruit Box Projection Information

1293 ASIC does not rely on the Fruit Box Projection Information as part of its continuous disclosure case (but draws upon it in its misleading and deceptive conduct case in respect of the Fruit Box

[2047] ACS at [1447]–[1448].

Agreement Representations (see [2226]–[2239] below). However, for continuity and context, I will deal with the *existence* of this information here.

1294 When the Fruit Box Announcement was released to the ASX on 24 February 2017, ASIC contended that three factual circumstances existed: (a) Fruit Box had told GetSwift that it currently made 1.5 million deliveries annually; (b) Fruit Box had not provided GetSwift with its actual historical, or any estimates of, its future projected deliveries or growth in deliveries; and (c) in making the Fruit Box Projection, GetSwift assumed an annual deliveries growth rate of approximately 24%, without any input from Fruit Box (collectively, the **Fruit Box Projection Information**).

1295 Factual circumstance (a) was not in contest.[2048] For the following reasons, I am also satisfied that factual circumstances (b) and (c) of the Fruit Box Projection Information existed.

1296 GetSwift's submits that ASIC has failed to prove factual circumstances (b) and (c) on the basis that it is likely that Mr Halphen provided GetSwift with such a growth rate at the meeting held between GetSwift and Fruit Box on 9 February 2017.[2049] It is said that Mr Halphen had reviewed the term sheet prior to the meeting (see [147]) and as such, he must have been aware that: (a) GetSwift provided a platform for tracking deliveries; (b) Fruit Box would pay GetSwift per delivery; and (c) the price Fruit Box would pay depended on how many deliveries were completed per month.

1297 Mr Halphen's interest in the price Fruit Box would pay is further demonstrated, it is said, in the correspondence between Fruit Box and GetSwift immediately following that meeting, and the fact that, although Mr Halphen could not recall a discussion about Fruit Box's rate of growth at the meeting, he accepted it is likely it was discussed: see [147].

1298 Moreover, GetSwift contends that it is most likely that the rate of growth disclosed at the meeting was equivalent to, or greater than, the "hurdle amount" of "200k" set by Mr Halphen.[2050] It is said that, given Mr Halphen held the position of CEO of Fruit Box since Fruit Box commenced trading in April 2000, it is highly unlikely that he would have selected a

[2048] Defences at [30(a)].
[2049] GCS at [328]–[332].
[2050] GCS at [331].

"hurdle amount" he did not think Fruit Box was likely to reach, otherwise he would not have had the protection from a price increase that he wanted to obtain. Further, emphasis was placed on the fact that Mr Halphen said that he did not give anyone at GetSwift "any *specific* estimate of Fruit Box's annual delivery growth" (see [147]); in other words, Mr Halphen did not deny disclosing a projected number of monthly deliveries.

1299 I am satisfied Fruit Box did not provide GetSwift with specific projections and rates of growth in deliveries. During cross-examination, Mr Halphen gave evidence that the figure of 200,000 deliveries per month was not a growth forecast, but rather it was a figure selected by Ms Mikac, in order to discuss, during the negotiations, the issue of whether Fruit Box could pay less per delivery if they did increase the number of the deliveries overtime: see [158]. This is substantiated by Ms Mikac's email to Mr Macdonald on 17 February 2017, in which she confirmed that "the 200K delivery was *only an example* … He wants to see what happens if we reach 150k, 200k, 250k etc" (emphasis added): see [156]. This demonstrates that GetSwift could not have reasonably utilised the "example" figure of 200,000 to estimate future growth for the purposes of the Fruit Box Projection. Indeed, it does not follow that, by merely enquiring about the operation of the term sheet and what effect 200,000 deliveries per month would have on the pricing, Fruit Box was representing that it expected that there would be such a rate of deliveries.

1300 Mr Halphen denied telling Mr Macdonald and Mr Hunter that Fruit Box would grow their deliveries by 66% in three years or that it would be possible that Fruit Box's rate of deliveries would grow well in excess of 20% per annum using the GetSwift platform: see [158]. I accept this denial. Moreover, Mr Halphen gave evidence that he could not recall a discussion about Fruit Box's growth rate at the 9 February 2017 meeting with Mr Macdonald and Mr Hunter (see [158]), although somewhat inconsistently, as noted above, he did accept that "it was likely" that he discussed Fruit Box's growth: see [147]. In assessing this final aspect of the evidence, Mr Halphen's acceptance that it is likely that he informed GetSwift of a likely growth in deliveries is contrary to the whole of the evidence, including his own recollection and Ms Mikac's recollection that there was no discussion of a growth rate at the meeting. There may have been some discussion, but if there was, I consider it was at a high level of generality. On the whole of the evidence, I am satisfied that no discussion occurred at any level of specificity so as to provide any detailed information as to the likely growth in deliveries.

1301 I am therefore satisfied to the requisite standard that the Fruit Box Projection Information factually existed, and there is no evidence which establishes GetSwift disclosed this information from the time of the release of the Fruit Box Announcement to the ASX on 24 February 2017 to 25 January 2018.

Fruit Box Termination Information

Existence

1302 On 20 March 2017, Fruit Box terminated the Fruit Box Agreement during the trial period (**Fruit Box Termination Information**). Mr Hunter admitted this fact,[2051] and GetSwift admitted it in its closing submissions.[2052] Mr Macdonald and Mr Eagle did not make a similar admission (although it is difficult to understand why).

1303 I am satisfied that the Fruit Box Termination Information existed by reason of the clear terms of the email that Mr Halphen sent Mr Macdonald on 20 March 2017, which stated: "this email is notice that we are *terminating the agreement* and will not be continuing the agreement for the Initial Term at the end of the limited roll out/trial period" (emphasis added): see [191].

1304 I regard the terms of this email to be entirely pellucid, although it appears that some disquiet or vexation as to the termination arose at GetSwift, particularly at the board meeting on 27 March 2017, when the Fruit Box Termination Information was addressed: see [195]–[197]. Mr Hunter, Mr Macdonald and Mr Eagle each attended this meeting. As the evidence reveals, it was at this meeting that Mr Hunter became aware that the Fruit Box Agreement was cancelled. Ms Gordon sensibly suggested that GetSwift should retract the announcement and Mr Hunter agreed to "own the retraction" of the ASX announcement and then "send it". In cross-examination, Ms Gordon clarified that the word "retract" meant "to tell the ASX the contract had been cancelled". She was also tested as to whether Ms Mikac had told her that the contract was cancelled, to which she replied: "Ms Mikac was very clear, very, very clear, crystal clear that the contract has gone, too late": see [197].

1305 Despite this evidence, which I accept, it appears Mr Hunter wanted to first "double check" with Fruit Box whether they actually wanted to terminate or were "simply angling for a discount":

[2051] Defences at [34].
[2052] GCS at [321].

see [196]. It was agreed that if, after clarification, Fruit Box still did not wish to proceed with the Fruit Box Agreement, then Mr Hunter would send the draft announcement to the ASX: see [196]. I am conscious of the fact that Mr Hunter wanting to "double check" is consistent with some uncertainty existing as to whether the agreement had actually been terminated, but I regard this ambiguity as little more than wishful thinking in the light of the clear terms of the 20 March 2017 termination email sent from Mr Halphen to Mr Macdonald and the evidence of Ms Gordon. Put in another way, I think it likely that this want to "double check" came out of the hope that Fruit Box management might be prevailed upon to change their mind, rather than any realistic expectation that things would change. The same can be said for Mr Hunter's email to the board on 27 March 2017, which used the language "just in case": see [198].

Awareness

1306 Having satisfied myself on the evidence that the Fruit Box Termination Information existed, it is necessary to turn to the knowledge of Mr Hunter, Mr Macdonald and Mr Eagle. I note that GetSwift admitted that it was aware of the Fruit Box Termination Information.[2053]

1307 Mr Hunter submits that he was not aware of the Fruit Box Termination Information and that the best evidence as to his state of mind at the time is his email of 27 March 2017 to the board of GetSwift, which reveals that it was one of uncertainty: see [198].[2054] This submission should be rejected. For reasons I have already touched upon, I do not believe that the email sent by Mr Hunter on 27 March 2017, on its own, undermines the plain terms of the email that Fruit Box sent on 20 March 2017 and the evidence of what occurred at the board meeting on 27 March 2017. As I said above, to my mind, the email sent on 27 March 2017, reflects no more than a wish on the part of Mr Hunter about being able to change Fruit Box's position: see [198]. Ms Gordon's evidence that Mr Hunter became aware of the Fruit Box Termination Information, and that he agreed to "retract" it at the board meeting, confirms that by at least by 27 March 2017, Mr Hunter must have known the Fruit Box Termination Information. Accordingly, I conclude that Mr Hunter had knowledge of the Fruit Box Termination Information from 20 March 2017 (and if I am wrong in relation to that, by 27 March 2017).

[2053] GCS at [321].
[2054] HCS at [84].

1308 Mr Macdonald does not advance submissions as to his awareness of the Fruit Box Termination Information, although I regard the fact of his knowledge to be clear by reason of him having received the email from Mr Halphen on 20 March 2017: see [191]. Notably, Mr Macdonald submits that Mr Hunter failed to comply with the board's resolution that he would be responsible for the announcement of the termination of the Fruit Box Agreement and, in doing so, breached cl 1.4(b) of his employment agreement, which required him to comply with all resolutions.[2055] While this submission is somewhat beside the point given Mr Halphen's email of 20 March 2017, it should still be rejected. Mr Macdonald was at the 27 March Board meeting and knew that Mr Hunter had taken responsibility to "retract" the announcement. He also received Mr Hunter's email of the same day attaching a draft announcement. Given that he received no confirmation of such an announcement being released (as was usual practice) and the nature of their working relationship (as revealed in all of the interactions between them), in the absence of any evidence to the contrary, it can be readily concluded on the balance of probabilities that he was aware Mr Hunter had not caused the termination to be disclosed to the market. This conclusion is consistent with Mr Macdonald himself taking no steps to ensure it was released.

1309 Finally, Mr Eagle submits that from the board meeting, all that he could have known was that there was some uncertainty as to whether the Fruit Box Agreement was in fact still on foot. Mr Eagle argues that Mr Hunter had assumed responsibility for dealing with the matter and that in any event, he says that there is no evidence Mr Macdonald sent Mr Halphen's email of 20 March 2017 to him, or that he had any knowledge of Mr Halphen's email and its contents.[2056] Finally, Mr Eagle contends that the highest the evidence rises is that he knew of the termination by late January 2018, which was when GetSwift received a letter from the ASX: see [202]. Again, these submissions should be rejected. Given the very clear terms of the termination email from Mr Halphen on 20 March 2017, which was discussed at the board meeting on 27 March 2017 at which Mr Eagle was present, and the follow-up email sent by Mr Hunter attaching a draft termination announcement stating that Fruit Box "decided to terminate the agreement", it is clear that the directors, including Mr Eagle, were aware that Fruit Box had terminated the agreement, despite Mr Hunter's wishful thinking: see [1307]. For the reasons I

[2055] MCS at [156].
[2056] ECS at [187]–[188].

have stated above, although Mr Hunter's email suggests a wish to be able to change Fruit Box's position, it does not support the conclusion that Mr Eagle was not aware that Fruit Box had terminated the agreement: see [1308]. As the General Counsel (or at least *de facto* General Counsel) and non-executive director of GetSwift, and in the light of attending the board meeting on 27 March 2017, where the contents of the email were discussed in such clear terms (as is evident from the evidence of Ms Gordon), I conclude that Mr Eagle must have been aware of the Fruit Box Termination Information from 27 March 2017.

1310 GetSwift, Mr Hunter and Mr Macdonald have admitted that between 20 March 2017 and 25 January 2018, the Fruit Box Termination Information was not disclosed to the ASX.[2057]

General availability

1311 GetSwift has not addressed the issue of whether the Fruit Box Termination Information was generally available. In any event, in the light of my discussion above as to the general availability in respect of the Termination Information (see [1143]), including that it would be untenable for investors to have been able to discern that the previously announced Fruit Box Agreement had been terminated, I find that the Fruit Box Termination Information was not generally available for the duration of the contravention.

Materiality

1312 GetSwift submits that the Fruit Box Termination Information was not material for three essential reasons. *First*, it is said that given the benefits expected to flow to GetSwift from the Fruit Box Agreement were not themselves material, the Fruit Box Termination Information could not have been material. *Secondly*, it is said that Fruit Box's reasons for terminating the Fruit Box Agreement were idiosyncratic and given the Fruit Box trial was progressing well, and the issues with the *csv. file* had even been solved because a successful completion of runs took place on 20 March 2017 (see [179]), any disclosure of the Fruit Box Termination Information could not have been worded to indicate that it did not reflect any material issue with GetSwift's Platform. *Thirdly,* it was said that at the time the Fruit Box Agreement was

[2057] Defences at [37].

terminated, GetSwift was on the brink of announcing the CBA Agreement, which would have rendered termination of the Fruit Box Agreement immaterial.[2058]

1313 These submissions should be rejected. It is clearly of significance that in the context of the Prospectus stating there was a 100% successful conversion rate, an Enterprise Client which GetSwift had estimated would result in "more than 7,000,000+ total aggregate deliveries" in a previous ASX announcement, had terminated the agreement within weeks of entering into it.[2059] It is not to the point that GetSwift's platform was supposedly not the cause of the termination, or that GetSwift was on the brink of announcing another agreement. The fact is that Fruit Box was no longer on board the GetSwift ship and the market did not know this. The façade of "commercial judgment" that things were rapidly changing cannot be deployed where there is no substance to support it; put bluntly, it was simply bad news that GetSwift's directors (other than Ms Gordon) were seeking to wish away. Indeed, in the light of the "price sensitive" Fruit Box Announcement, which informed the market that GetSwift had entered into a three-year exclusive contract, the Fruit Box Termination was material because it would have (a) informed investors that previously anticipated benefits under the Fruit Box Agreement would not materialise, and (b) corrected and updated the market as to a previously announced contract that had both been regarded by GetSwift, and released to the market, as "price sensitive".

1314 I should note that while investors may have been aware that GetSwift's clients could terminate their contracts, the Fruit Box Announcement engendered and reinforced the expectations that this *specific* contract remained on foot, particularly in circumstances where it had been marked as "price sensitive" and there was no contrary announcement. A finding of this nature is, as I have already explained, consistent with Mr Molony's views and Listing Rule 3.1(b), which characterises the termination of a material agreement as information that would be expected to be disclosed to the market. Indeed, given that GetSwift was a newly listed start-up company and employed technology that was largely untested and unproven in the market, the decision not to proceed with the trial by a client as significant as Fruit Box was important contextual information which would have influenced an investor in deciding whether to acquire or dispose of GetSwift shares.

[2058] GCS at [322(a)–(c)].
[2059] ASIC Reply at [211].

Conclusion

1315 Having satisfied myself that each of the four elements of the continuous disclosure contravention is made out, I conclude that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Fruit Box Termination Information from 20 March 2017 until 25 January 2018.

H.3.2 *Commonwealth Bank of Australia*

1316 ASIC's case in respect of CBA concerns GetSwift, Mr Hunter and Mr Macdonald.

CBA Agreement

1317 On 30 March 2017, GetSwift entered into the CBA Agreement with CBA: see [204].[2060]

CBA Announcement

1318 GetSwift, Mr Hunter and Mr Macdonald each admitted that, on 4 April 2017, GetSwift submitted the CBA Announcement to the ASX, entitled "Commonwealth Bank and GetSwift sign exclusive partnership": see [362].[2061] It was also common ground that the CBA Announcement stated, among other things, that: (a) GetSwift had signed an exclusive multiyear partnership with CBA; (b) rollouts would commence shortly to selected markets with a full national deployment expected to be in place in 2017; and (c) GetSwift estimated the deal involving the CBA Agreement would result in over 257,400,000 deliveries on its platform (**CBA Deliveries Projection**) and an aggregated transaction value of over $9 billion (**CBA Value Projection**) over the next five years (together **the CBA Projections**).[2062]

1319 The CBA Announcement was marked as "price sensitive", following Mr Hunter's express instructions to Mr Mison: see [346]. The documentary record establishes that, the day before the CBA Announcement was released to the ASX, Mr Hunter, Mr Macdonald and Mr Eagle received an email from Mr Mison attaching the final PDF of the CBA Announcement: see [361]. They subsequently received email confirmation from Mr Mison on 4 April 2017 that the CBA Announcement had been received by the ASX and marked as "price sensitive": see [363].

[2060] CBA Agreement (GSWASIC00062596).
[2061] Defences at [46].
[2062] Defences at [47].

Accordingly, I am satisfied that each of the directors had knowledge that GetSwift had submitted the CBA Announcement to the ASX and was aware of its contents.

1320 For completeness, I note that Mr Hunter admitted that he contributed to drafting the CBA Announcement,[2063] and that he, together with Mr Macdonald, approved its content and authorised its transmission to the ASX for the purpose of publication.[2064] While Mr Macdonald has not made any admissions, the fact that he was copied into the email that Mr Mison sent, which attached the final version of the CBA Announcement, to my mind, is of significance: see [361]. Indeed, in the light of this fact, it is not to the point that the amendments proposed by Mr Macdonald to the draft CBA were immaterial,[2065] or that Mr Hunter had assumed responsibility for the accuracy of the statements in the announcement.[2066] Mr Macdonald was plainly aware of what was to be released to the ASX.

CBA Projection Information

Existence

1321 ASIC contends that, when the CBA Announcement was released to the market on 4 April 2017, the following circumstances existed: (a) GetSwift had assumed the CBA Projections over a five year period despite the CBA Agreement being for two years; (b) GetSwift had calculated the CBA Projections by assuming the existence of 55,000 retail merchants of CBA with Albert devices; (c) CBA had informed GetSwift that the number of CBA retail merchants was not 55,000; (d) the CBA Deliveries Projection and CBA Value Projection had not been provided by, or otherwise approved by, CBA; (e) the CBA Agreement provided that the GetSwift application that was to be installed on Albert devices (as defined within that agreement) would only be loaded onto those Albert devices with the "merchant category codes agreed by the parties in the Project Plan"; (f) no merchant category codes had been (or were ever subsequently) agreed between GetSwift and CBA; and (g) an application had not yet been

[2063] Defence at [347(b)].
[2064] Defence at [347(c)].
[2065] MCS at [198].
[2066] MCS at [192].

developed, alternatively customised, by GetSwift for deployment on Albert devices (collectively, the **CBA Projection Information**).[2067]

1322 The factual circumstances (a) and (e)–(g) were not in dispute and were admitted by GetSwift, Mr Hunter and Mr Macdonald.[2068] In determining whether the factual circumstances (b)–(d) existed, it is necessary to consider GetSwift's submissions in some detail.

1323 As to factual circumstance (b) of the CBA Projection Information, GetSwift submits that the Court should find that at the meeting held on 13 February 2017, CBA informed GetSwift that CBA had 55,000 retail merchants, in terms which did not draw any distinction between retail merchants and the subset of those retail merchants who had Albert devices. GetSwift submits that there is no evidence that such a distinction was ever drawn to GetSwift's attention in a way which made clear that the distinction affected the number of retail merchants the GetSwift platform would reach. Since CBA did not draw a distinction, GetSwift says that it also did not make any such distinction between retail merchants and retail merchants with Albert devices, and so did not make any assumption which made that distinction.[2069]

1324 Prefacing this submission, it should be noted that the proposition there is "no evidence" that the distinction between retail merchants and the subset of those merchants who had Albert devices was drawn to GetSwift's attention, is incorrect.[2070] On 16 March 2017, CBA sent its "Q&A" document to GetSwift in which it provided the following question and answer: "Does that mean that all retailers have Albert? No, not all retailers have Albert". Mr Hunter himself read the draft Q&A document because he sent an email to Mr Polites stating "See attachment with our notes", attaching a revised version of the Q&A document: see [296]–[301].

1325 Notwithstanding that a distinction was in fact drawn between retail merchants and the subset of those merchants who had Albert devices, GetSwift advance four points to support the submission that it did not assume the existence of the 55,000 figure to calculate the CBA Projections.

[2067] FASOC at [48], noting I have combined 4FASOC at [48(d)–(e)] for simplicity.
[2068] Defences at [48].
[2069] GCS at [405].
[2070] ASIC Reply at [236].

1326 *First*, is the context in which the 13 February 2017 meeting occurred; namely that by the time of the NDA, it was apparent that the revenue that both GetSwift and CBA would make from the GetSwift app on the Albert device would depend on the number of merchants who used the app, and it was important for the parties in determining the joint commercial value of the deal to have some understanding of the likely number of transactions that would be put through the joint platform. Further, GetSwift relies upon Mr Budzevski's evidence that he understood, from Mr Hunter's email dated 4 February 2017, that one of the things Mr Hunter wanted to achieve at the upcoming meeting for 13 February 2017 was to "assign a value to the expected metrics we expect to put through the joint platform": see [208]–[214].

1327 *Secondly*, as to the meeting itself on 13 February 2017 (see [215]–[221]), GetSwift relies upon Mr Madoc's recollection that someone from CBA, possibly Mr Budzevski, had said at one of his initial meetings with GetSwift, likely the meeting on 13 February 2017, that CBA had 55,000 retail merchants. This was consistent with Mr Madoc's recollection that "55,000 retail merchants was the sort of number that had been mentioned in initial discussions with GetSwift"; although perhaps somewhat inconsistent with the fact he did "not recall any discussion about the number of Albert terminals in circulation [and] the number of CBA merchants who had an Albert terminal" and that he "recall[ed] that Mr Budzevski was pretty general in what he spoke about …": see [221].

1328 However, Mr Madoc's evidence must be balanced with the evidence from other key witnesses in this proceeding, including the following: Mr Budzevski, who, despite having no recollection of the 13 February 2017 meeting (see [215]), said that he first saw the 55,000 figure in the draft media release sent to him by Ms Gordon on 21 February 2017 and could not recall telling anyone at GetSwift that the figure was 55,000 (see [219]); Ms Kitchen, who did not recall seeing or hearing the 55,000 merchants figure before reading the draft media releases attached to Mr Armstrong's email to her dated 27 February 2017 (see [255]); Mr Polites, who had assumed that the 55,000 merchants figure was GetSwift's own estimate based on its data (see [251]), and Ms Gordon's recollection that she first saw or heard of the 55,000 "existing businesses" figure when she received the draft media release from Mr Hunter on 21 February 2017, and that she did not know how this estimate was calculated (see [227]).

1329 *Thirdly*, GetSwift point to Mr Chamber's acceptance that he thought he was the source of the 55,000 retail merchants figure in the draft release: see [309]–[316]. However, for the reasons that I outlined above (at [309]–[316]), when Mr Chambers' evidence is examined in its totality,

it is difficult to conclude that he was in fact the genesis of the 55,000 retail merchants figure: both the ASIC examiner and cross-examiner failed to establish that he was the source of the 55,000 figure, or that he had in fact, given anyone the 55,000 figure. The questioning simply resulted in Mr Chambers agreeing that Ms Natalie Kitchen's email *suggested* he was the source. Properly characterised and understood in the light of all the evidence, this indication, such as it is, is of little weight.

1330 *Fourthly*, implicit in GetSwift's submission is that because CBA did not take issue with the figure being utilised and did not raise with GetSwift any concern about the number of retail merchants, there is a stronger likelihood that the 55,000 figure was provided by CBA to GetSwift. For example, in respect of a draft dated 21 February 2017 announcement that Ms Gordon prepared (see [231]), which relevantly contained the 55,000 figure, GetSwift highlight how Mr Budzevski did not inform her that the draft media release was in any way incorrect.[2071] I do think this is of real significance, given the reasonable inference to be drawn from CBA not correcting the figure is that these figures may have in fact been provided to GetSwift, at least initially. As the documentary evidence reveals, CBA did later take issue with the figures being utilised on multiple occasions, but to my mind, that fact is more compelling in relation to the separate factual circumstance (namely, factual circumstance (c)).

1331 Ultimately, when all the evidence is considered, there remains some ambiguity as to whether CBA actually informed GetSwift of the 55,000 retail merchants figure, particularly at the 13 February 2017 meeting. The persons most likely to have known the source of the 55,000 figure are Mr Hunter and Mr Macdonald, but they have chosen not to give evidence. I must do the best I can on the evidence adduced. In all the circumstances, given the context in which the 13 February 2017 meeting occurred, Mr Madoc's recollection as to what occurred at the meeting, and the fact that the 55,000 figure appears to have emerged after this meeting in the draft ASX announcements, it cannot be ruled out with that either Mr Budzevski, Mr Chambers or Mr Madoc provided GetSwift with the 55,000 retail merchants figure. To this end, I am not reasonably satisfied that ASIC has proven that GetSwift had "assumed" the existence of 55,000

[2071] GCS at [348].

retail merchants of CBA with Albert devices. I find that factual circumstance (b) of the CBA Projection Information therefore is not established.

1332 While GetSwift might not have "assumed" the existence of 55,000 retail merchants, the reality is that it should not have calculated the CBA Projections using the 55,000 figure. This is because I am satisfied that the factual circumstance alleged by ASIC in subparagraph (c) – that CBA informed GetSwift that the number of retail merchants was *not* 55,000 – existed.

1333 The documentary record reveals that CBA (via Mr Budzevski and Ms Kitchen) attempted to correct the 55,000 merchant figure on at least three occasions: on 2 March 2017, 9 March 2017 and 3 April 2017.

1334 On 2 March 2017, in an email to Mr Budzevski, Ms Kitchen removed the reference to "55,000 merchants" and inserted the following text (see [260]–[262]):

> GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform over the next five years, with an estimated transaction value of $9 billion. **(this was provided by GetSwift PR rep).**
>
> (Emphasis added).

1335 This comment was provided to GetSwift: see [266]. However, despite the removal of this reference by Ms Kitchen, Mr Hunter appears to have re-inserted this figure in a revised ASX announcement which was attached to an email that he sent to Mr Polites on 8 March 2017: see [274]. In that email, Mr Hunter described the revisions as "minor but VERY important additions/changes". GetSwift then appears to have circumvented Ms Kitchen by returning the draft amended media release via Ms Gordon to Mr Budzevski and Mr Madoc (as opposed to sending the draft via Mr Polites to Ms Kitchen, which had been the standard method at that time): see [276]–[280]. Nonetheless, Ms Kitchen was forwarded the email and she queried whether the figures were global figures, when in fact they should have been domestic figures: see [283]–[288]. This concern was passed onto GetSwift: see [289].

1336 Moreover, Mr Budzevski made numerous other attempts to correct the position (both internally and externally) and informed Ms Kitchen: "[n]ot sure where the 55k came from, but it does not represent CBA merchants" (see [317]); "the 55,000 retail merchants is a figure that GetSwift supplied. I imagine this is their total retail network around the globe which would be of no value in the announcement" (see [299]); and "we should not quote the 55,000 as this is not a true reflection of our device/merchant position" (see [321]).

1337 Even if the previous attempts to correct the figure had not been clear enough, the high-water mark of the evidence appears to be Ms Kitchen's email of 3 April 2017 to Mr Polites (and later forwarded to Mr Hunter and Mr Macdonald), which stated that "[t]he ASX announcement refers to *55,000 merchants which is incorrect*. The actual retail merchant number isn't available" (emphasis added): see [348], [352]. This email, which is pellucid in its terms, corroborates factual circumstance (c) of the CBA Projection Information exited – that is, that CBA had informed GetSwift that the number of CBA retail merchants was *not* 55,000.

1338 I should note that GetSwift did advance an array of attacks in respect of this email; namely, it must be viewed in the context of the other "more significant information" that GetSwift received prior and subsequent to that email, including: (a) the fact that CBA might have informed GetSwift that it had 55,000 retail merchants at the 13 February 2017 meeting; (b) that CBA had not previously expressed concern that the figure was incorrect in previous versions of the announcement which included the figure of 55,000; (c) that Ms Kitchen's experience or knowledge should not have caused GetSwift to rely on her information over and above the information of other CBA representatives at the 13 February 2017 meeting; (d) the fact that even within CBA there was confusion as to whether the number of retail merchants was in fact 55,000; (e) that the email contained somewhat difficult or contradictory wording; and (f) in subsequent emails following Ms Kitchen's emails, Mr Budzevski did not raise any objections or concerns about the delivery/value figures and CBA did not subsequently correct GetSwift's ASX release after it was issued.[2072]

1339 To my mind, these attacks and attempts to resort to context do not have merit: Ms Kitchen corrected the 55,000 figure on 3 April 2017. For completeness, I will, however, say something more about the fifth point raised, which attacks what was actually being conveyed by Ms Kitchen. GetSwift submits that Ms Kitchen's email made two statements that, on their face, were contradictory, or at least in tension. The submission is that, if the "actual retail merchant number isn't available", then it would be difficult to say that any specific number was incorrect.[2073] It was said that the language "the ASX Announcement refers to 55,000 merchants, *which* is incorrect" is apt to convey that the inclusion of a reference to any figure

[2072] GCS at [382], and [406].
[2073] GCS at [386]–[387].

in the ASX announcement was "incorrect", because one was not "available", rather than that the specific figure itself was necessarily incorrect. Moreover, it is said that it was also unclear precisely what was meant by a figure not being "available", given that Mr Chambers, for one, had believed the figure of 55,000 retail merchants was an "official figure of the bank" which "was accurate as at March 2017": see [310].

1340 This submission should be rejected. *First*, the submission obscures an ordinary and clear reading of Ms Kitchen's email, which draws a direct correlation between the incorrectness of the 55,000 figure, not the inclusion of a figure in general. This is consistent with Mr Polites email that forwarded Ms Kitchen's email to Mr Hunter and Mr Macdonald and advised: "You may want to correct that fact in the ASX announcement, otherwise CBA will issue a correction announcement – which isn't a good look": see [352]. *Secondly*, any reliance on the belief of Mr Chambers, for the reasons outlined above, does not accord with the totality of the evidence.

1341 As to factual circumstance (d) of the CBA Projection Information (noting I have combined 4FASOC [48(d)–(e)] for simplicity), GetSwift submits that it is "pellucidly clear" that the CBA Projections were approved by CBA.[2074] Despite this, the arguments in support of this assertion are scattered, fragmented and at times difficult to follow. Nonetheless, the contention appears to draw upon the following points: (a) from at least 27 February 2017, GetSwift was seeking approval from CBA; (b) CBA received multiple versions of the announcement and media release (which included CBA Projections) but did not raise objection to these figures; and (c) GetSwift consulted CBA on the terms of the final draft of the announcement, which included the CBA Projections, to which CBA raised two matters but did not object to the inclusion of the CBA Projections in the announcement, and after amending these matters and asking CBA if there were any material objections to the final form of the announcement, which included the CBA Projections, no objection was raised.[2075]

1342 GetSwift also point to CBA's conduct after the release of the announcement, relying on:

[2074] GCS at [408].
[2075] GCS at [408].

(1) Mr Chambers' email to Mr Hunter and Mr Macdonald on 6 December 2017,[2076] which it says was consistent with Mr Budzevski's statement that the number of Albert terminals were steadily increasing from about 2015 onwards (see [370]–[371]);

(2) the fact that it would be "clearly expected" that CBA would take such corrective action, whether with the ASX or raising it directly with GetSwift, if it believed the CBA Projections were incorrect, and that there is no evidence that any corrective action was ever taken by CBA, and flowing from this, it was reasonable for GetSwift to take from CBA's lack of objection or correction to the announcement that CBA had approved, and was content with, the CBA Projections;2077

(3) connected to the former point, that it was reasonable, given that objection was only raised to the 55,000 figure and not the CBA Projections, that CBA approved these figures;2078 and

(4) the email sent by Mr Begbie to GetSwift and PwC on 1 February 2018 (see [381]),[2079] which GetSwift take to mean that CBA had approved the figures in the CBA Announcement.

1343 When properly analysed, these submissions should be rejected.

1344 *First*, as I have outlined above, I accept the evidence of the key CBA witnesses in respect of these figures: see [364]. Each of Mr Madoc, Mr Chambers, Mr Budzevski and Ms Kitchen did not know the source of the 257,400,000 and $9 billion figure, nor could they recall discussing or providing these figures to GetSwift. In addition, Ms Gordon also did not know how these figures were calculated, and first heard of them when she received the draft media release from Mr Hunter on 21 February 2017.

1345 *Secondly*, contrary to GetSwift's submission, CBA did raise objection to the CBA Projection. As described at [285], on 9 March 2017, Mr Budzevski informed Ms Kitchen that

> … the number of GetSwift merchants referenced seems to be a global reference. We need to pull this back to Australia as CBA only offers the product domestically … The volume of deliver[ies] quoted '250m' over 5 years needs to be positioned in the context

[2076] GCS at [392]–[393].
[2077] GCS at [395].
[2078] GCS at [388]–[390].
[2079] GCS at [396].

of Australia. **They should not provide global numbers** …

(Emphasis added).

1346 An hour later, Ms Kitchen conveyed Mr Budzevski's concerns by email to Mr Polites (later forwarded to Mr Hunter and Mr Macdonald), stating that the figures in the release (referring expressly to the number of merchants and the CBA Projections) appear to be global, that Australian numbers needed to be used, and requesting GetSwift to "adjust these figures": see [287]–[289]. The clear message conveyed by CBA to GetSwift was that the figures being utilised were too high and should be reduced.

1347 *Thirdly*, any finding that CBA objectively approved the CBA Projections is contrary to Ms Kitchen's and Mr Budzevski's evidence. For example, Ms Kitchen made plain that the CBA Projections were GetSwift's numbers and took care to mark them with a note: "(this was provided by GetSwift PR rep)": see [262]. She did not consider it appropriate for her "to fact check another organisation's ASX announcement and so … did not raise this issue any further": see [358]. I accept that this is an appropriate position for Ms Kitchen to take, given the numerous attempts that had been made over the preceding two months to question and verify GetSwift's CBA Projections.

1348 *Finally*, I do not accept that any significant weight should be placed on Mr Begbie's email. As I noted above, Mr Begbie did not see any version of the announcement that was made by GetSwift to the ASX on 4 April 2017 before it was released to the ASX (see [382]). There is also no suggestion that he had any involvement in negotiating the "initial" strategic partnership between CBA and GetSwift. Lastly, GetSwift did not require Mr Begbie for cross-examination and did not ask him about this email. Accordingly, Mr Begbie's email is not persuasive evidence that CBA had approved the figures in the CBA Announcement.

1349 In the end, I am satisfied that both the CBA Deliveries Projection and the CBA Value Projection had not been provided by, or otherwise approved by, CBA. Factual circumstance (d) of the CBA Projection Information existed.

Awareness

1350 Having satisfied myself that the circumstances in the CBA Projection Information existed (apart from factual circumstance (b)), it is necessary to turn to whether Mr Hunter and Mr Macdonald had knowledge of this information. Various submissions were advanced in opposition to this finding, particularly with respect to factual circumstance (c).

1351 Mr Hunter asserts that he had provided the estimate of 55,000 merchants and the CBA Projections to CBA representatives "without dissent or correction from CBA" and "without CBA raising an eyebrow" on various occasions: see [213], [216] and [290]–[291].[2080] He says that given he had repeatedly corresponded with CBA using the figure of 50,000 to 55,000 merchants, and that it was implausible CBA did not know the number of its own merchants, Mr Hunter submits it was open for him to read this email as saying that it was incorrect for the ASX announcement to refer to the number of merchants because the number was not a number CBA made publicly available, as opposed to being because the number itself was incorrect.[2081] Moreover, Mr Hunter submits that a finding that he was aware that the projections had not been approved by CBA is not available given that "numerous drafts of the CBA Announcement", including Ms Kitchen's email on 3 April 2017, did not take issue with the projection of 257,400,000 deliveries that appeared in the draft announcement (notwithstanding the projection was dependent on the 55,000 merchants figure). Finally, Mr Hunter submits that since CBA did not take issue with the projections on numerous drafts, it was open for him to believe that the CBA representatives approved them.[2082]

1352 Mr Hunter's submissions only need to be stated to be rejected. He was actively involved in drafting the ASX announcement, including how the projection was calculated (see [245]–[248], [290]). Mr Hunter drafted the CBA Announcement, including the CBA Projections: see [222]–[226], [274], and [343]–[344]. Indeed, the evidence reveals he thought deeply about them: see [245]–[248], [290]. After the first review by CBA, the "55k merchants" figure was removed: this would have indicated it was wrong (although this is also consistent with the submission that this was not public information). Nonetheless, Mr Hunter reinserted the figure in a later iteration: see [274]. Following this, he was also involved in multiple communications with CBA (albeit with Mr Polites often the intermediary), such as being forwarded a copy of Ms Kitchen's email to Mr Polites of 9 March 2017 (see [287]–[289]) noting that the figures need to be adjusted to Australian numbers rather than global, to which he responded attempting to rationalise the "55k merchants" figure (see [290]). Most importantly, he was also sent Ms Kitchen's email of 3 April 2017 (see [348] and [352]), which made pellucid that the "ASX

[2080] HCS at [105], [107], and [112(b)].
[2081] HCS at [105]–[107].
[2082] HCS at [108].

announcement refers to 55,000 merchants which is incorrect". There is no evidence that supports the conclusion that Mr Hunter thought this email meant that the figure of "55,000" was not publicly available information, as opposed to meaning that which is provided by a plain reading of the text: the "ASX announcement refers to 55,000 merchants which is incorrect." Accordingly, on the basis of the only natural inference to be drawn from this email as well as from the above evidence, I am satisfied that Mr Hunter was aware of factual circumstance (c)–(d).

1353 Mr Macdonald's submissions are developed in more detail. This is understandable given the evidence reveals Mr Hunter took the reins on this one. He accepts that he was aware of factual circumstance (a),[2083] but disputes his awareness as to factual circumstances (b)–(f).[2084] It appears that in respect of factual circumstances (c)–(d), he contends there are a number of matters which tend against any finding that he was aware, at the time that the CBA Announcement was released, that the projections as to deliveries and aggregated transaction value were based on the figure of 55,000 retail merchants, that he was aware that Ms Kitchen's view was that the figure was inaccurate, or that there was even a reason to question the accuracy of the projections: (a) his almost complete lack of involvement in the drafting of the CBA Announcement, including the fact that he did not engage with, nor was responsible for or aware of, the arithmetic contained in the CBA Announcement; (b) Mr Hunter's emails of 24 February 2019 and 9 March 2019 setting out the basis for the calculations which were sent weeks prior to Ms Kitchen's email of 3 April 2017; and (c) that he had valid reasons to believe that CBA considered the 55,000 figure to be correct, given, *inter alia*, the weight of the evidence suggests the figure of 55,000 retail merchants with Albert terminals emanated from CBA in January or February 2017, the fact that Ms Kitchen, at the time she removed the reference to 55,000 retail merchants, did not know whether or not the number was correct (see [350]) and that prior to Ms Kitchen's email, none of Mr Madoc, Mr Budzevski or Mr Chambers indicated that the 55,000 retail merchant figure or the projections were inaccurate.[2085] Further, Mr Macdonald submits that ASIC has not established that, at the time the CBA Announcement was released,

[2083] MCS at [225].
[2084] MCS at [237(d)].
[2085] MCS at [227]–[235].

he understood anything other than that the final version had been sent for review and approval by CBA.[2086]

1354 While it is not without some considerable hesitation, I reject Mr Macdonald's submissions that he was not aware that CBA had informed GetSwift that the number of CBA retail merchants was not 55,000 or that the CBA Deliveries Projections and CBA Value Projections had not been provided by, or otherwise approved by, CBA. While I accept that Mr Hunter took the reins on the CBA Announcement, Mr Macdonald still had an involvement, even if it was passive. As a precursor, he participated in negotiations, both internally at GetSwift and with representatives of CBA, in relation to the CBA Agreement between about 23 January 2017 and 31 March 2017: see [208]–[216], [229]–[230], [256], [271], [326], [333], [341]–[342]. He also provided comments, although minor, on one of the first iterations of the Agreement (see [233]) and received email correspondence passing between, *inter alia*, Mr Hunter and Mr Polites dated 23 February 2017, in which the calculation of, and the basis for, the CBA Projections were discussed (see [245]–[248]). Most importantly, however, is the fact that he was forwarded the key communications relating to the CBA Projection figures, including: (a) Ms Kitchen's email of 9 March 2017 and Mr Hunter's response outlining a rationale for the "55k merchants" figure (which demonstrated that the projections were inherently linked to such figure); and (b) Ms Kitchen's email of 3 April making clear that the "55k merchants" figure was incorrect. While I accept that it is a little less than one month between these queries being raised, and Mr Macdonald seems to have entrusted Mr Hunter to deal with the calculations, the fact is that what else could those projections have been based on? Both technically and intuitively, knocking out a core element of the calculation would throw the rest of the equation. Furthermore, it is not as though Mr Macdonald had not thought about the CBA Agreement during this time – he was still negotiating and finalising the terms of the agreement in late March: see [333], [341]. I am therefore satisfied that Mr Macdonald was aware of factual circumstances (c) and (d).

1355 Having disposed of Mr Hunter and Mr Macdonald's specific submissions, and in the light of the substantial documentary evidence, including their persistent involvement in the negotiation of the CBA Agreement (see, e.g., [205]–[221], [256], [268]–[272], [326], [336]–[338], [340]–

[2086] MCS at [236].

[342]), I am satisfied that both directors had knowledge of the CBA Projection Information (absent element (b) which has not been proven to exist). By reason of their knowledge, I am satisfied that GetSwift was aware of the CBA Projection Information (absent element (b)) as at 4 April 2017.

General availability

1356 GetSwift admit that the CBA Projection Information was not "generally available".[2087]

Materiality

1357 GetSwift advanced a range of arguments against a finding that the CBA Projection Information was material. To the extent these raise the Absence of Quantifiable Benefits Contention, there is no need for me to repeat what I have already said at [1198]–[1211].[2088] Further, in respect of its Share Price Contention, the CBA Projection Information is an example of GetSwift's "have your cake and eat it too" approach. This is because GetSwift accept that the share price trading data supports the view that the benefits the market expected from the CBA Agreement were material, but then goes on to assert that ASIC has not discharged its burden of proof on materiality. This inconsistent approach is replicated throughout GetSwift's submissions. For example, as I dealt with above (at [1312]), in relation to the Fruit Box Agreement, GetSwift's submissions state that, at the time the Fruit Box Agreement was terminated, GetSwift was on the brink of announcing the CBA Agreement, which would have rendered termination of the Fruit Box Agreement immaterial given the "potential scale of that partnership".[2089] As should be clear by now, the impact on GetSwift's share price is not determinative as to whether, on an *ex ante* basis, GetSwift should have disclosed the Fruit Box Agreement Information. It is but one consideration.

1358 There are two additional points that GetSwift has raised that I should discuss in more detail.

1359 *First*, GetSwift contends that none of the Investor Witnesses gave evidence in chief as to whether their investment decision would have been any different had they been provided with the CBA Projection Information. It is said that given ASIC's failure to adduce this evidence,

[2087] GCS at [410].
[2088] GCS at [416].
[2089] GCS at [322(a)–(c)].

despite having the power to issue s 1317R notices, the Court should infer that any evidence that would have been raised would not have assisted ASIC's case on the issue of materiality.[2090] *Secondly*, GetSwift contends that Mr Younes' evidence in relation to the CBA Announcement, namely that he only used the information in the CBA Announcement as a "risk buffer" to take into account the risk of investing in an early-stage company (see [1180]) tends against a finding that the CBA Projection Information was material.[2091]

1360 With respect, each of these contentions misses the point. The *first* of these contentions appears to be a submission as to some form of inference of the kind identified in *Commercial Union Assurance Co of Australia Limited v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 (at 418–419) directed to the use of powers reserved for ASIC under the *Corporations Act*. The difficulty with this contention is that, as I outlined above, the Investor Witnesses' views as to whether the omitted information was material could not be admissible; instead, their evidence is relevant because it provides some indication of investor expectations. As to the *second* contention, while Mr Younes might have only used the information in the CBA Announcement as a "risk buffer", the evidence from the Aesir Capital Report (see [1216]), and which I discuss below, demonstrates that investors did rely on the CBA Projection figures in their decision to acquire or dispose of GetSwift's shares. In any event, the surmise of one of the Investor Witnesses is in no way conclusive that this fact could have been deduced from known factors and "could have been observed readily, meaning easily or without difficulty": see *Grant-Taylor (FC)* (at 424 [119] per Allsop CJ, Gilmour and Beach JJ).

1361 Having dealt with each of GetSwift's arguments, I should make clear that I find the CBA Projection Information was material in the light of the specific and unqualified projections in the "price sensitive" CBA Announcement. The CBA Deliveries Projection (257,400,000 deliveries) and the CBA Value Projection (aggregated transaction value of over $9 billion) were not insignificant figures; they would have been relied upon by investors in determining the value of the CBA Agreement and in their assessment of whether to acquire or dispose of GetSwift shares. This is evident from the Aesir Capital Report, which appears to have used the annual deliveries figure for GetSwift's partnership with CBA in the revenue model to estimate

[2090] GCS at [413]–[414].
[2091] GCS at [415].

the value of GetSwift's stock;[2092] that is, it used the figure of 51,480,000 (i.e. 247,400,000 divided by five).[2093]

1362 Indeed, the CBA Projection Information would have conveyed to investors that: (a) the CBA projections were significantly less certain than the CBA Announcement made them out to be; (b) the status of the CBA rollout was far less advanced than disclosed (particularly since the app had not yet been developed for Albert devices); and (c) less weight should be placed on the earlier announcement and the certainty of the benefits to be captured by GetSwift. In this sense, it was information that would have, on an *ex ante* assessment, influenced an investor's decision as to whether to acquire or dispose of GetSwift shares.

1363 In respect of the Continuing Periods Contention,[2094] GetSwift says that ASIC pays no regard to the various announcements made by GetSwift and ignores that on 18 December 2017, GetSwift submitted to the ASX, and the ASX released, an announcement entitled "CBA and GetSwift Update", which provided the market with an update on the partnership (see [373]).[2095] However, I do not see how the release of this particular announcement affects the materiality of the CBA Projection Information, given that it simply provided a broad update on the partnership. For instance, the update stated, among other things: "Approximately 90,000 merchants will receive the new operating system with the GetSwift platform with go to market live rollouts planned from Feb 2018 onwards" and "CBA will begin deploying the GetSwift platform as part of the new Albert operating system rollout."[2096] It is not clear, nor is it explained, how this relates to the CBA Projection Information or aids GetSwift. Indeed, to this end, I accept GetSwift, Mr Hunter and Mr Macdonald's admission in the alternative that between 4 April 2017 and until the date of issue of this proceeding, the CBA Projection Information was not disclosed to the ASX.[2097]

Conclusion

[2092] GSW.0013.0001.0822 at 0848.
[2093] ACS at [1462].
[2094] GCS at [417].
[2095] GSW.1001.0001.0342.
[2096] GSW.1001.0001.0342 at 0342–0343.
[2097] Defences at [51(c)].

1364 Having established each of the four elements of ASIC's continuous disclosure contravention in respect of the CBA Projection Information (absent element (b), which was not made out), I conclude that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the CBA Projection Information from 4 April 2017 to the date of commencement of this proceeding.

H.3.3 *Pizza Pan Group Pty Ltd*

1365 ASIC's case in respect of Pizza Pan concerns GetSwift, Mr Hunter, Mr Macdonald and Mr Eagle.

Pizza Pan Agreement

1366 On or about 20 April 2017, GetSwift signed the Pizza Pan Agreement, which stated that Pizza Pan was to provide the services within Australia "exclusively". Further, the term was to be for "12 months + option to renew at same terms 12 months + 12 months (comprised of a limited roll out plus the initial term)": see [408]–[411].

Pizza Hut Announcement

1367 Each of the defendants admits that on 28 April 2017, GetSwift submitted the Pizza Hut Announcement to the ASX entitled "Pizza Hut and GetSwift sign exclusive partnership", which was released to the market as "price sensitive": see [429].[2098] It was also common ground that the Pizza Hut Announcement stated: (a) GetSwift had signed an exclusive multi-year partnership with Pizza Hut; (b) Pizza Hut was the largest pizza chain in the world with more than 12,000 Pizza Hut Restaurants and Delivery Units operating worldwide; (c) Pizza Hut was an American restaurant chain and international franchise; and (d) Pizza Hut had over 15,000 locations worldwide as of 2015 and was a subsidiary of Yum! Brands Inc, one of the world's largest restaurant companies.[2099]

1368 The documentary record establishes that Mr Hunter, Mr Macdonald and Mr Eagle received email confirmation from Mr Mison on 28 April 2017 that the Pizza Hut Announcement had been submitted to, and released by, the ASX (which attached the final copy of the Pizza Hut

[2098] Agreed Background Facts (GSW.0002.0002.0001) at [34]; Defences at [60].
[2099] Defences at [61].

Announcement): see [430]. Accordingly, I am satisfied that each of the directors had knowledge that GetSwift had submitted the Pizza Hut Announcement to the ASX and was aware of its terms. For completeness, I note that Mr Macdonald instructed Mr Mison (copied to Mr Hunter and Mr Eagle) to submit the announcement to the ASX: see [426]. Mr Hunter also admitted that he contributed to drafting the Pizza Hut Announcement.[2100] Further, Mr Eagle received various draft versions of the Pizza Hut Announcement, including an email from Mr Macdonald which stated, "for your review", and subsequently provided comments on the draft announcement: see [418]–[419].

1369 I should note one additional point here, which concerns what appears to be a "slip" made by GetSwift in the Pizza Hut Announcement. When Mr Eagle was reviewing the announcement on 24 April 2017, he stated "only comment my side – we should take out 'multiyear'": see [419]. Based on this email from Mr Eagle, Mr Hunter submits that it would have been reasonable for him to proceed on the basis that "multiyear" would be removed from the announcement before it was released and that the Court would not find that Mr Hunter had actual knowledge of the slip.[2101] This submission, however, is difficult to reconcile with the following facts: 1) Mr Hunter received Mr Eagle's email regarding the removal of 'multiyear'; 2) On the morning of the announcement, Mr Hunter sent two emails containing final drafts of the Pizza Hut Announcement to Mr Eagle and Mr Macdonald "[f]or release"; 3) Mr Hunter was copied to the email subsequently sent by Mr Macdonald to Mr Mison attaching the draft announcement for release to the ASX "asap"; and 4) Mr Hunter received a copy of the final announcement from Mr Mison: see [413]–[430]. Furthermore, the attempt by Mr Hunter to argue that the Court should infer that he did not have actual knowledge because "neither Mr Eagle nor Ms Gordon appears to have picked it up either" misrepresents the role that Mr Hunter assumed as to the release of announcements to the ASX. For example, Mr Mison recalls that Messrs Hunter and Macdonald specifically directed that ASX announcements were to be approved by them, and not by Mr Eagle, Ms Gordon or anyone else.[2102] Furthermore, Mr Hunter stated in an email to Mr Macdonald on 30 March 2017 regarding the drafting of ASX announcements: "I need to do this – it's [a] very specific skill set."[2103] Given the protective

[2100] Defences at [347(d)].
[2101] HCS at [126].
[2102] Mison Affidavit (GSW.0009.0036.0001_R) at [36]; T283.22–27 (Day 4); T285.1–4 (Day 4).
[2103] GSWASIC00023808.

manner in which Mr Hunter approached the task of drafting announcements, his close engagement with the drafting of the Pizza Hut Announcement, and the fact that he directed Mr Macdonald to release the announcement to the ASX, it is difficult to understand how it would be reasonable for him to assume that someone else would have removed "multiyear" from the announcement and that he was not aware that it someone had not done so. As such, I am satisfied that Mr Hunter was aware that the term "multiyear" appeared in the Pizza Hut Announcement.

Pizza Pan Agreement Information

Existence

1370 At the time of the Pizza Hut Announcement on 28 April 2017, ASIC alleges that the following factual circumstances existed: (a) the parties to the Pizza Pan Agreement were GetSwift and Pizza Pan, an Australian proprietary company; (b) the Pizza Pan Agreement extended to GetSwift providing its services in Australia only, and not internationally; (c) the Pizza Pan Agreement was for a term of twelve months only, with an option for Pizza Pan to renew for two further terms of twelve months; (d) the Pizza Pan Agreement provided a "limited initial roll out" of the GetSwift Platform; an initial term of twelve months to commence following the "limited initial roll out"; and there would be no charge for the use of the GetSwift Platform during "an initial 3 month time period"; and (e) the "initial 3 month time period" had not elapsed (collectively, the **Pizza Pan Agreement Information**).

1371 The defendants admitted the Pizza Pan Agreement Information, subject to the following three considerations and some infelicities which do not matter for present purposes.[2104] Factual circumstances (c)–(e) were not admitted by Mr Eagle.[2105] Mr Eagle contends the information alleged in these subparagraphs did not reflect the Pizza Pan Agreement,[2106] and because the information did not exist, he could not have actual knowledge of it.[2107]

1372 In respect of factual circumstance (c), Mr Eagle argues that the term of the Pizza Pan Agreement was for a *minimum* of twelve months (as opposed to "twelve months only"), and

[2104] Defences at [62].
[2105] Defences at [62].
[2106] ECS at [221]–[225].
[2107] ECS at [232]–[234].

that Pizza Hut Australia was required to opt out of any renewal after that term.[2108] Further, in respect of factual circumstance (d), Mr Eagle asserts that the limited initial roll out period was part of the initial term and not separate from it.[2109]

1373 Given this issue also subsists in respect of the submissions on materiality, it is necessary to extract the relevant parts of the Pizza Pan Agreement. As to the term, the agreement provided:

4.	**Term**	12 months + option to renew at same terms 12 months + 12 months (comprised of a limited roll out plus the initial term), as follows: • **Joint Product & Production roadmap implementation:** To start on or about May 2nd 2017 • **Proposed Limited Initial Roll Out** - One city - **Phase 1** : 15-25 stores; **Phase 2**: Single State with Multiple stores **Phase 3**: Multi State & Multi Stores; **Phase 4**: Commencement of full national rollout. • **Initial Term** – 12 months pricing guarantee (following the limited roll out and no charge for platform use during initial 3 month time period). Platform use fee rates to start no later than August 1st 2017 and valid until August 1st 2019. Platform use from August 2017 will be charged at the below rates. • Client has option to renew for an additional 12 months plus another +12 months after initial and each 12 month term expires. Original price as per tier below plus AUD$0.02 per delivery to be applied. If client does more than 300,000 deliveries per month, then no fee increase will apply for the contract extension.

1374 Otherwise, the Agreement incorporated the standard terms in Schedule 1, which as to the term provided (in cl 1):

SCHEDULE 1

1. Term and Termination.

   a. Trial Period and Initial Term. From the date of signing of the Term Sheet to which this Schedule 1 is attached ("Agreement"), GetSwift will provide the Client with a Trial Period set out in Item 4 of the term sheet. Upon expiration of the Trial Period, this Agreement will automatically renew for the Initial Term set out Item 4 of the term sheet.
   b. Renewal Terms. Upon expiration of the Initial Term, this Agreement will automatically renew for successive twelve (12) month periods (each, a "Renewal Term") unless either notifies the other party in writing of its intent not to renew this Agreement at least ninety (90) days prior to the expiration of the Initial Term or then-current Renewal Term, as applicable. Any such Renewal Term will be on the terms and conditions of this Agreement unless otherwise agreed in writing.

1375 Although the drafting is somewhat infelicitous, it seems to me that there was to be a phased, or staged, roll-out which would end with "full national rollout". This would include an initial three month period in which no charge would be levied, beginning with the joint product & production roadmap implementation, (which was to begin on or about 2 May 2017, and end by

[2108] ECS at [221].
[2109] ECS at [223].

no later than 1 August 2017), after which the initial term of 12 months at the indicated pricing would begin. So while the Schedule (but not the Term Sheet) referred to a "Trial", this was referrable to the three-month no charge period after which the initial 12-month charge period would automatically begin. This was followed by automatic successive 12-month terms, unless 90 days' written notice was of non-renewal was given.

1376 So where does this leave Mr Eagle's contentions? I accept that on any construction the Pizza Pan Agreement was for a minimum period of 15 months. While it is somewhat unclear, to my mind, strictly speaking, the Agreement was for a "term" of twelve months (probably indicative why all of the other defendants admitted this circumstance), with an "add on" of a 3 month trial period (as opposed to what I interpret Mr Eagle to contend to be a 15 month "initial term"). Indeed, to my mind, even if I was to adopt Mr Eagle's construction (that is that the 3 month roll out period was part of the initial term), this would mean the initial term would remain 12 months, but include within it the three month roll out period. In any event, as will be seen, these technicalities do not matter all too much.

1377 I should note for completeness that in respect of factual circumstance (e), Mr Eagle submits that "the initial 3 month limited roll out period" had not yet commenced because the initial term of the Pizza Pan Agreement had not yet commenced.[2110] This submission is somewhat unclear because, even on this construction, it follows that the "initial 3 month time period" would not have elapsed.

1378 For these reasons, Mr Eagle's submissions in respect of the existence of the Pizza Pan Agreement Information must be rejected. I am satisfied that the Pizza Pan Agreement Information existed.

Awareness

1379 Mr Macdonald does not does not advance any submissions specific to his awareness of the Pizza Pan Agreement Information. Similarly, Mr Hunter's only point of contention is that, as noted above, he apparently did not have actual knowledge of the slip resulting in the word "multi-year" appearing in the Pizza Hut Announcement. For the reasons outlined above (at [1369]), that submission must be rejected. By reason of Mr Hunter and Mr Macdonald's

[2110] ECS at [225].

involvement in the negotiations of the Pizza Pan Agreement (see [389]–[408]), I am satisfied that each was aware of the Pizza Pan Agreement Information.

1380 For completeness, I note that I also reject Mr Eagle's contention that he was not aware of the Pizza Pan Agreement Information because the information did not reflect the terms of the Pizza Pan Agreement and therefore did not exist.[2111] The fact is, they existed, they were admitted by the other defendants, and Mr Eagle had knowledge by reason of the fact that he received a copy of the draft Pizza Pan Agreement and reviewed it; he was copied into email correspondence passing between representatives of GetSwift and Pizza Pan in relation to the draft Pizza Pan Agreement; and he received the executed copy of the Pizza Pan Agreement: see [404]–[408].

1381 By reason of the knowledge of Mr Hunter, Mr Macdonald and Mr Eagle, I am satisfied that GetSwift was aware of the Pizza Pan Agreement Information as at 28 April 2017.

General availability

1382 GetSwift argues that the Pizza Hut Announcement, in substance, disclosed factual circumstances (a) and (b) of the Pizza Pan Agreement Information; namely that the parties to the Pizza Pan Agreement were GetSwift and Pizza Pan, an Australian proprietary company; and that the Pizza Pan Agreement extended to GetSwift providing its services in Australia only, and not internationally. At the heart of this submission is the argument that an ordinary reasonable investor would not have read the Pizza Hut Announcement on the basis of a "highly artificial lawyers' reading".[2112]

1383 It is appropriate to begin with two general submissions made by GetSwift.

1384 *First*, GetSwift submits that ASIC has not discharged its onus in proving that it was not generally available information that the Pizza Hut chain or franchise in Australia was, in fact, operated by the entity Pizza Pan. GetSwift submits that ASIC has made no effort to address and prove a lack of general availability of this type of information, for example, by undertaking "a simple internet search" or "looking at Pizza Hut's website in Australia".[2113] Contrary to these submissions, however, a continuous disclosure case does not require ASIC to prove the

[2111] ECS at [232].
[2112] GCS at [465]–[475].
[2113] GSC at [468].

existence of *all* generally available information. It need only prove that the omitted information was not generally available during the relevant periods. Indeed, ASIC is not required to negative every unsubstantiated assertion as to general availability, but is only required to prove those matters pleaded.

1385 *Secondly*, GetSwift contends that there is no evidence to support the idea that investors "would be very concerned" about the precise proprietary limited entity that was the contractual counterparty.[2114] However, this submission proceeds on a false premise, given that such information, as I will reveal below, would have significantly qualified the information that was generally available to the market, and therefore investor expectations and confidence.

1386 Turning to the substance of GetSwift's contentions, in relation to factual circumstance (a), GetSwift submits that the Pizza Hut Announcement made it clear that the arrangement related to the provision of services to Pizza Hut's "retail stores in Australia" and that it would have been known that importantly, Pizza Pan traded in Australia under the name "Pizza Hut".[2115] GetSwift relied on Reliance was placed on: (a) the Master Franchise Agreement (under which Pizza Pan operates);[2116] (b) Pizza Pan's twitter logo ("Pizza Hut Australia") and its tag ("@PizzaHutAu");[2117] (c) the Pizza Hut webpage that Mr Branley had responsibility over;[2118] (d) the request for proposal which stated that it was "Pizza Hut Australia" who was "seeking a supplier of delivery tracking…";[2119] (e) Mr Coupe's introduction email to Ms Gordon which stated: "welcome to team Pizza Hut"[2120] and his further email saying, "[t]hanks for all your support and your continued investment in Pizza Hut"[2121] (both of these instances being times when he used Pizza Hut to refer to Pizza Pan);[2122] (f) Pizza Pan employees' email addressed ended in "@pizzahutaustralia.com.au";[2123] (g) the fact that Pizza Pan employees routinely

[2114] GCS at [470].
[2115] GCS at [471].
[2116] SGW.1022.0001.0003 at 0005, and 0011.
[2117] GSWTB001.
[2118] T583.34–44 (Day 7).
[2119] GSWASIC00059206.
[2120] GSWASIC00051648.
[2121] GSWASIC00040859.
[2122] T583.12–32 (Day 8).
[2123] GSWASIC00027169; GSWASIC00027131; GSW.1020.0001.1054; GSWASIC00045682; GSWASIC00032836 at 839.

referred to the organisation as Pizza Hut (as accepted by Mr Branley);[2124] and (h) Mr Branley's report entitled "PIZZAHUT.COM.AU: GETSWIFT TRIAL REPORT AND NEXT STEPS".[2125]

1387 Further, in relation to factual circumstance (b) of the Pizza Pan Agreement Information, GetSwift highlight how the Pizza Hut Announcement stated:

> Pizza Hut has partnered with GetSwift to **offer its retail stores in Australia** the ability to compete with their global counterparts when it comes to deliveries and logistics.
>
> Approximately 270 Pizza Hut and another 50 Eagle Boys stores are located **in Australia.**[2126]

1388 GetSwift also drew upon the cross-examination of Mr Vogel and how he interpreted the Pizza Hut Announcement:

> Mr Vogel, when you read the paragraph I've just taken you to did you understand that the announcement as to the agreement that was being announced by GetSwift related to a partnership between Pizza Hut and GetSwift in relation to retail stores in Australia? **--- Yes, that was my understanding.**
>
> And if you go through, please, to paragraph 17 of your affidavit – could we bring the affidavit up. I'm sorry, paragraph 18. That's my fault. Now, this is jumping forward in time to when you made the recommendation, but do you see there you say:
>
> > *The most significant which I viewed as being CBA, Pizza Hut Australia and Just Eat.*
>
> Do you see that? --- Yes, I do.
>
> And the reference to Pizza Hut Australia, I suggest, is because you understood from the Pizza Hut announcement that the partnership between GetSwift and Pizza Hut was in relation to Pizza Hut Australia; correct? **That's correct**.[2127]

1389 GetSwift submits that ASIC's case depends upon the following "unproven premise": (a) that a hypothetical reasonable investor would read the first two sentences of the ASX announcement "literally and a-contextually" to assume that GetSwift had an agreement with an entity named "Pizza Hut"; (b) they would assume that the "Pizza Hut" entity was the same entity with international franchise rights; and (c) they would subsequently ignore the express words of the

[2124] T583.9–10 (Day 8).
[2125] GSWTB0002.
[2126] Pizza Hut Announcement (GSW.1001.0001.0470) (emphasis added).
[2127] T828.36–829.5 (Day 11) (emphasis added).

ASX announcement, which made it clear that the Pizza Hut stores the subject of the announcement were stores in Australia.[2128]

1390 ASIC submits that weight must be given to the fact that the Pizza Hut Announcement made multiple references to the agreement being a *global* one: (a) "the largest pizza chain in the *world* with more than 12,000 Pizza Hut Restaurants and Delivery Units operating *worldwide*"; (b) "an *international* franchise" which "has over 15,000 locations *worldwide*"; (c) the "*world's* largest restaurant companies"; (d) the "*world's* largest fast food restaurant companies"; (e) "growing segment of the pizza market *worldwide*"; and (f) that "[w]e are … partnering with one of what is indisputably a *global icon*".[2129] Moreover, even though Yum was not a party to the Pizza Pan Agreement, AISC highlight that the Pizza Hut Announcement contained an entire paragraph which described "Yum! Brands" and that it "operates the brands Taco Bell, KFC, Pizza Hut, and WingStreet worldwide".[2130]

1391 On an ordinary reading of the text of the Pizza Hut Announcement, I am satisfied that a reasonable hypothetical investor would regard the agreement signed to be with an international company. Indeed, there is not even reference to Pizza Pan in the Pizza Hut Announcement, but rather the international entity, Pizza Hut. However, I am not of the view that the announcement conveys the agreement extended to providing services outside Australia. This is consistent with the evidence of Mr Vogel (as noted at [1388]). That is because the general statements about Pizza Hut being an international company cannot undermine the specific statement that "Pizza Hut has partnered with GetSwift to offer its retail stores *in Australia* the ability to compete with their global counterparts when it comes to deliveries and logistics", and the reference to there being "270 Pizza Hutt [*sic*] and another 50 Eagle Boys stores are located *in Australia*" (i.e. the market that is being serviced) (emphasis added). In any event, to adapt a term used in defamation, this is the way a hypothetical referee would have understood what was conveyed. I find that factual circumstance (a) was not generally available, but I am not satisfied that factual circumstance (b) was not generally available.

[2128] GCS at [467(a)–(c)].
[2129] Pizza Hut Announcement (GSW.1001.0001.0470) (emphasis added).
[2130] Pizza Hut Announcement (GSW.1001.0001.0470).

1392 As to factual circumstance (c), it is said that the words "multiyear partnership" should be construed to mean a contract that would extend in excess of one year. That is, that the Pizza Pan Agreement was for a term of 12 months only, with renewal options for further terms. Given, as I said above, the Pizza Pan Agreement would extend at least for one year and three months and then continue for further successive ongoing one-year terms unless not renewed in writing. That is, it is said that a positive act of non-renewal, which in substance is no different from an express right of termination.[2131] GetSwift submits that it is common to refer to the "term" of such agreements as the specified duration, assuming that the right of termination is not exercised earlier, otherwise the "term" of any agreement could never be specified if there were any rights of termination. GetSwift's interpretation of the "term", in my opinion, does not accord with the plain and natural meaning of the words "multiyear partnership".[2132] A 12-month Initial Term cannot be construed as a multi-year partnership. Even including the three month roll out period in this calculation, I still do not think it gets to a multi-year partnership.

1393 GetSwift has not contended that factual circumstances (d) and (e) were generally available. In any event, I am satisfied on the basis of my discussion above concerning the general availability of the Agreement Information (at [1117]–[1141]) that the information relating to the initial roll out period of the Pizza Pan Agreement was not generally available.

Materiality

1394 GetSwift's submissions as to the materiality of the Pizza Pan Agreement Information proceed on a now familiar basis.

1395 *First*, GetSwift submits that the share price trading data does not support a finding that the Pizza Pan Agreement Information was material,[2133] highlighting that there was only a 1.4% increase in the share price on the day of the Pizza Hut Announcement, a 7.4% decline on the next trading day, and an 11.8% decline five trading days after the announcement.[2134] It follows, it is said, that the hypothetical disclosure of less favourable news by way of some qualification

[2131] GCS at [476].
[2132] GCS at [255].
[2133] GCS at [479].
[2134] GSW.0003.0005.0325 at 3.

to the benefits to be derived under the Pizza Hut Announcement would not have elicited a significant reaction.[2135]

1396 *Secondly*, GetSwift submits that there is a temporal dimension to the allegations not addressed by ASIC, asserting that here the contravention is not sustainable for the duration alleged due to GetSwift's announcements to the ASX on 9 February 2018 (see [1056]) and 19 February 2018 (see [1057]), both of which expressly discussed trial periods.[2136]

1397 *Thirdly*, as to factual circumstances (d) and (e), which concern the initial three-month roll-out period, GetSwift contends that ASIC has not explained why the absence of a charge for the first three months is of significance, given this could only be material if the market would expect the revenues in the first three months to be material. GetSwift assert that there is no evidence of this, given Mr Molony expected a lag between entry into Enterprise Client agreements and those agreements generating revenue (see [1208]). Indeed, it was said that the initial three months corresponded to "joint product & production roadmap implementation", and it would not be expected that material transactions would be occurring in that phase.[2137] Further, GetSwift highlight that it is also elusive why the fact that an initial three-month period had not ended would be a concern as to materiality, in circumstances where it says that a Proof of Concept Trial had already taken place prior to entering into the Pizza Pan Agreement and that after the initial three-month period, the 12-month charge period would automatically begin.

1398 I reject the first and second contention. As to the *first* contention, as I have repeated and explained above, it is not decisive that there is a lack of temporal correlation between the GetSwift's share price data and the Pizza Hut Announcement.

1399 The *second* contention is a repetition of its Continuing Periods Contention: see [1212]–[1229]; in particular, [1228]–[1229]. It is true that the 9 February 2018 Market Update (see [1056]) and the 19 February 2018 Market Update (see [1057]) discussed the existence of trial periods:[2138] the *former* in the specific context of Fruit Box; and the *latter* stated that "contracts for Enterprise Clients are initially two years in length, *with initial periods of testing and*

[2135] GCS at [480].
[2136] GCS at [482].
[2137] GCS at [477].
[2138] GCS at [482].

integration", that "almost 50% of GetSwift's Enterprise Client contracts have progressed through to early stages of the revenue generation phase" and "[o]ther than as previously disclosed, the majority of the announced contracts continue to progress through various pre-revenue generation phases" (emphasis added). However, in neither announcement is there any specific reference to the fact that Pizza Pan was undertaking an initial period or limited roll out, nor for how long this "typical" arrangement had been occurring (given the Pizza Hut Announcement was released almost a year earlier). I therefore do not consider that these general statements, including those in the 19 February 2018 Market Update, advance GetSwift's contention. To this end, any submission that the Pizza Hut Agreement Information became generally available at an earlier date than pleaded and was no longer material should be rejected.

1400 GetSwift's *third* submission has some merit. Why the absence of a charge for the first three months would be linked to a concern as to materiality is not explained, and would inevitably depend on whether the market would expect the revenues in the first three months to be material. In the absence of evidence to this effect and giving weight to Mr Molony's evidence that the market would expect a lag between GetSwift's entry into enterprise client agreements and those agreements generating revenue, I am not satisfied that factual circumstance (d) was material. Indeed, one must recall that Proof of Concept Trial had already taken place prior to the entry into the Pizza Pan Agreement: see [390]. By extension, I do not think factual circumstance (e) can be considered material either.

1401 But I do not think that these findings mean that the remainder of the Pizza Pan Agreement Information was not material. The Pizza Hut Announcement was released as "price sensitive" and conveyed to investors that GetSwift had entered into a multi-year partnership with Pizza Hut, the largest pizza chain in the world. Subject to the risks identified in the Prospectus, this would have heightened investor expectations and confidence about the GetSwift platform, particularly since it indicated the prospect of increased future revenue flows and the fact that a large multinational organisation was using GetSwift's unproven technology. Indeed, the Pizza Pan Agreement Information was material because, among other things, it would have, in my view most importantly, indicated to investors that the parties to the Pizza Pan Agreement were GetSwift and Pizza Pan, an *Australian* proprietary company, as opposed to Pizza Hut, an *international*, worldwide or global brand. It also would have indicated that there was a multi-year (i.e. more than one year) agreement on foot which, and as the narrative attests, was incorrect.

1402 Beyond that which I have discussed above, GetSwift, Mr Hunter and Mr Macdonald admit that between 28 April 2017 and the date of issue of this proceeding, the Pizza Pan Agreement Information was not disclosed to the ASX.[2139]

Conclusion

1403 I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Pizza Pan Agreement Information (absent element (b), which I am not satisfied was not generally available) from 28 April 2017 until the commencement of this proceeding.

H.3.4 *All Purpose Transport*

1404 ASIC's case in respect of APT concerns GetSwift and Mr Macdonald (in terms of the APT Agreement Information) and GetSwift, Mr Hunter and Mr Macdonald (in terms of the APT No Financial Benefit Information).

APT Agreement

1405 On or about 2 May 2017, APT signed the APT Agreement with GetSwift: see [455]. The material terms of the APT Agreement were that: (a) the APT Agreement contained a "free trial period" ending 1 June 2017; (b) APT was permitted, at any time in the period up to seven days prior to the expiration of the "free trial period", to terminate the APT Agreement by giving notice in writing; and (c) if APT terminated the APT Agreement at any time in the period up to seven days prior to the expiration of the "free trial period", the three-year term of the APT Agreement would not commence and APT was not obliged to use GetSwift exclusively for its last-mile delivery services.

APT Announcement

1406 GetSwift, Mr Hunter and Mr Macdonald admitted that on 8 May 2017, GetSwift submitted the APT Announcement to the ASX, which was marked as "price sensitive", and which stated that GetSwift had signed an exclusive commercial multi-year agreement with APT: see [458].[2140] The documentary record further establishes that Mr Hunter and Mr Macdonald received email confirmation from Mr Mison on 8 May 2017 confirming that the APT Announcement had been

[2139] Defences at [64].
[2140] Defences at [74]–[75].

released (which attached the final copy of the ASX announcement): see [459]. Accordingly, I am satisfied that Mr Hunter and Mr Macdonald were aware that GetSwift had submitted the APT Announcement to the ASX and were aware of its terms. In any event, Mr Hunter and Mr Macdonald admitted that they contributed to the drafting and authorised the transmission of the APT Announcement respectively: see [457].[2141]

APT Agreement Information

Existence

1407 ASIC alleges, and GetSwift and Mr Macdonald admitted,[2142] that at the time of the APT Announcement on 8 May 2017, the following factual circumstances existed: (a) the APT Agreement contained a "free trial period" ending 1 June 2017; (b) the parties were still within the "free trial period"; (c) APT was permitted, at any time in the period up to seven days prior to the expiration of the "free trial period", to terminate the APT Agreement by giving notice in writing; and (d) if APT terminated the APT Agreement at any time in the period up to seven days prior to the expiration of the "free trial period", the three-year term of the APT Agreement would not commence and APT was not obliged to use GetSwift exclusively for its last-mile delivery services (collectively, the **APT Agreement Information**).

Awareness

1408 GetSwift accepts that it was aware of the APT Agreement Information.[2143] While Mr Macdonald did not advance any submissions to the contrary, it is clear from the extensive documentary record that he was aware of the APT Agreement Information, given he negotiated the terms of the APT Agreement with Mr White (APT's Finance Manager) between 23 March 2017 and 2 May 2017 (see [450]), received a signed copy of the APT Agreement by email on 2 May 2017 (see [455]), and signed and replied to Mr White attaching the APT Agreement on behalf of GetSwift around 3 May 2017 (see [456]). Accordingly, I am satisfied that Mr Macdonald was aware of the APT Agreement Information as at 8 May 2017.

[2141] Hunter Defence at [347(e)]; Macdonald defence at [271(a)(iii)].
[2142] Defences at [76]; GCS at [543].
[2143] GCS at [543].

General availability

1409 Other than contending that factual circumstances (c) and (d) could be deduced from the Prospectus, which I reject for the reasons as outlined above (at [1117]–[1141]), GetSwift did not dispute that the APT Agreement Information was generally available.[2144] For completeness, I note that I find factual circumstances (a) and (b) of the APT Agreement Information were not generally available for the reasons outlined at [1117]–[1141], given that investors could not have discerned from the APT Announcement that the APT Agreement contained a free trial period, which the parties were still within.

Materiality

1410 There are three reasons advanced by GetSwift as to why the APT Agreement Information was not material.[2145]

1411 *First*, it is said that the APT Agreement Information related to a very early position which developed thereafter as the contractual relationship between the parties progressed. Accordingly, it is claimed that it cannot have been material, particularly in circumstances where the disclosure of such information would become "stale", or positively misleading in a relatively short period of time.[2146] For example, GetSwift assert that it would have been positively misleading to disclose factual circumstances (a) and (b) of the APT Agreement Information given the issues that emerged in relation to the trial period (see [462]–[476]). Specifically, in relation to factual circumstance (a), it says the trial period did not end on 1 June 2017. Further, as to factual circumstance (b) of the APT Agreement Information, between 18 May 2017 and 5 or 13 June 2017, the free trial period had not yet commenced, and on and after 18 or 26 July 2017, no written notice of termination had been given and so the initial 36-month term had commenced in accordance with cl 4.[2147]

1412 *Secondly*, GetSwift submits that the benefits expected to flow as a result of the APT Agreement would not have had a material effect on the price or value of GetSwift's shares.[2148] This

[2144] GCS at [544].
[2145] See also MCS at [304]–[305].
[2146] GCS at [547].
[2147] GCS at [548].
[2148] GCS at [550]–[554].

argument appears to be premised on the fact: (1) there was no material movement in GetSwift's share price following the APT Announcement (a 3.3% increase on the day of the APT Announcement, which return to $0.60 on the following day);[2149] (2) the market did not have information as to revenue or the number of deliveries that were expected to be generated by GetSwift's entry into the APT Agreement;[2150] and (3) against the backdrop of information that was already available to the market (including information from the CBA announcement (see [362]) and GetSwift's April Appendix 4C (see [31])), the expected benefits would not have been regarded as material.[2151] Relatedly, it is said that even if any benefits expected from the APT Agreement were material, the evidence does not provide a sufficient basis for concluding that the APT Agreement Information would have made a material difference to the market's assessment of those benefits.[2152]

1413 *Thirdly*, GetSwift contends that the allegations in respect of general availability and materiality are not sustainable for the entire duration of the contravention in the light of the 2018 ASX Market Update Information, and that the significance to the market of any expected benefits of the APT Agreement would have diminished as GetSwift proceeded to enter into new partnerships with large customers such as Yum, NA Williams and Amazon.[2153]

1414 To the extent these arguments are manifestations of GetSwift's Absence of Quantifiable Benefits Contention, Continuing Periods Contention and Share Price Contention, there is no need for me to repeat what I have already said. There are, however, two additional points that I should make as to these contentions.

1415 *First*, GetSwift's submission, particularly in respect of its first contention, proceeds on the false premise that the APT Agreement was varied in the manner contended for by GetSwift. For reasons I will explain below (at [1421]–[1433]), the APT Agreement was varied in the manner pleaded in the 4FASOC (at [81]), as opposed to in accordance with what I will term GetSwift's "variation theory" (see [1421(1)] below). In any event, GetSwift's submission that it would have been positively misleading to disclose elements (a) and (b) of the APT Agreement

[2149] GSW.0003.0005.0325; GCS at [551]–[552].
[2150] GCS at [553].
[2151] GCS at [555]–[556].
[2152] GCS at [557].
[2153] GCS at [558]–[559].

Information because of the issues that emerged in relation to the trial period should be rejected. Those issues did not emerge until 18 May 2017 (ten days after the APT Announcement was released) and do not appear to be issues GetSwift foresaw at the time of the release: see [455]–[461]. In my view, this argument is nothing but an attempt to justify the omission of material information from the public domain.

1416 *Secondly*, as to GetSwift's third contention, notwithstanding that the 9 February 2018 Market Update (see [1056]) and the 19 February 2018 Market Update (see [1057]) expressly discussed, in general terms, the existence of trial periods,[2154] I do not regard this as impacting upon the general availability or materiality of the APT Agreement Information. While general statements as to trial periods were discussed (see [1399]), these were not made in the context of APT. Indeed, the only specific reference to APT in these market updates was that APT is "not presently using the platform" and that "GetSwift is unaware whether this is temporary or permanent". This must be compared to the actual state of affairs, which, as I will reveal below, was that the initial term had not commenced because the trial period had not commenced (or had alternatively ended) and that APT had ceased using the GetSwift Platform.

1417 Ultimately, for the reasons similar to those that I have already canvassed in respect of the other Enterprise Clients, I am satisfied that the APT Agreement Information was material. It provided important contextual and qualifying information that would have informed investors: (a) the parties were still within a free trial period (at least at the time of the APT Announcement); (b) the realisation of the benefits under the "price sensitive" APT Agreement were significantly less certain than that which was announced; and (c) the exclusive agreement, as announced in the APT Announcement, would not take effect until the successful completion of the trial period, subject to early termination.

Conclusion

1418 For the reasons I have outlined, I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the APT Agreement Information from 8 May 2017 until the date on which this proceeding was commenced.

[2154] GCS at [558].

APT No Financial Benefit Information

Existence

1419 ASIC contends that, as at 17 July 2017, the following factual circumstances existed: (a) the free trial period under the APT Agreement had not yet commenced (alternatively, had not yet ended) because APT and GetSwift had agreed to defer the commencement of (or alternatively extend) the trial period until such a time as APT was able to enter and route jobs satisfactorily on the GetSwift Platform; (b) the initial term of the APT Agreement had not yet commenced; (c) APT had not yet made any deliveries using the GetSwift Platform; and (d) APT had ceased engaging with GetSwift (collectively, the **APT No Financial Benefit Information**).[2155]

1420 Factual circumstances (b) and (c) were not in issue and were admitted by GetSwift, Mr Hunter and Mr Macdonald.[2156] Accordingly, factual circumstances (a) and (d) remain in contest.

1421 GetSwift submits that the contractual position changed on or shortly after 18 July 2017 and, given this change, factual circumstances (a) and (d) cannot exist.[2157] GetSwift contends that this logic arises from a "standard contractual variation analysis".[2158] The following points were advanced in support of this contention:

(1) The date of commencement of, and the length of, the trial period were varied on 18 May 2017 (as pleaded at 4FASOC (at [81])), with the effect of that variation being that the "free trial period" under the APT Agreement would:

(2) commence on the date that APT was able to successfully import its .csv file into the GetSwift Platform, a notion which appears to derive from an email that Mr Macdonald sent Mr White (see [465]);

(3) continue for such time that GetSwift worked on implementing APT's three customisation requirements (see [465]); and

(4) the trial period would end six weeks after the *.csv file* was operating (collectively, the **Variation Theory**).[2159]

[2155] 4FASOC at [80]–[85].
[2156] Defences at [82].
[2157] GCS at [562]. See also MCS at [306]–[307].
[2158] GCS at [538]–[539].
[2159] GCS at [508]–[513].

(5) The varied trial period was for a maximum of six weeks, and it commenced no earlier than 5 June 2017 and no later than 13 June 2017, dates which reflect Ms Gordon's emails that the .csv file was working (see [473] and [476]), meaning that the varied trial period ended no earlier than 17 July 2017 and no later than 25 July 2017.2160

(6) The effect of cl 4 of the APT Agreement, together with the varied trial period, was that:

(7) the initial term would commence "immediately following" the expiration of the varied six-week trial period, which in context is properly read as commencing on the day after expiration of the six-week period (i.e. the initial term would commence no earlier than 18 July and no later than 26 July); and

(8) the initial term was for a period of 36 months, unless APT gave notice in writing 7 days prior to the expiry of the maximum six week period, on 17 July 2017 or alternatively 25 July 2017, that is, notice of termination was required to be given by 10 July or 18 July 2017 respectively.

(9) APT never gave any notice in writing of termination at any time, let alone between the date of the variation and 18 July 2017.

(10) There is no evidence that the customisation milestones the subject of the 18 May 2017 email were not met.

(11) The APT Agreement therefore automatically commenced its initial term of 36 months no earlier than 18 July 2017 and no later than 26 July 2017.

1422 These submissions must be rejected.

1423 *First*, I do not accept GetSwift's Variation Theory. I should note that, contrary to GetSwift's contention, ASIC did not plead that the APT Agreement was varied until the date that APT were able to import its *.csv file* into the GetSwift Platform successfully. Instead, in its 4FASOC, ASIC pleaded that by the variation, APT and GetSwift agreed to defer the commencement of, or extend, the "free trial period" under the APT Agreement until such a time as APT was able *to enter and route jobs satisfactorily* on the GetSwift Platform.[2161] The nature of the variation contended and pleaded by ASIC is supported by the language used in Mr White's email, which

[2160] GCS at [529].
[2161] 4FASOC at [81] (emphasis added).

stated, "[t]his email is to notify GetSwift that due to a lack of any progress in setting up our account we require our trial period to be extended until such time that we are able to *import and route jobs*" (emphasis added): see [462]–[463].

1424 Moreover, the substance of Mr White's email, in which the customisation requirements are allegedly identified, deals with the importing and routing of jobs (as described at [462]–[464]). These can hardly be considered "customisations"; they are the basic functionalities that GetSwift promoted in its Prospectus, namely the ability to allow customers to route and track jobs ("our aim is to provide businesses of all sizes with the ability to dispatch, track and set routes" and "our customised delivery tracking software platform optimises routes for businesses").[2162] Given that the customisation requirements were so integral, it would not make sense, as is implicit in GetSwift's Variation Theory, that the trial period would end, and the initial term of the agreement would commence, *irrespective* of whether GetSwift had completed those requirements. That contention would have APT agreeing to be locked into an agreement in circumstances where the only functionality provided to it was the ability to import a data file. GetSwift's Variation Theory is therefore inconsistent with the core commercial purpose or object to be secured by the APT Agreement. This conclusion is fortified by the plain language of Mr White's email, in which he stated, "*starting* with the csv file would be good"; as opposed to stating that importation of the .csv file was the object (emphasis added): see [466].

1425 Analysed in this light, I am satisfied that on 18 May 2017, the APT Agreement was varied in the manner pleaded at 4FASCOC (at [81]), which is consistent with the evidence of Mr White. Such a finding is important because, although the evidence reveals that Ms Gordon might have been able to import successfully a *.csv file* into the GetSwift Platform, there is no evidence that GetSwift was able to "import and route jobs" on the GetSwift Platform.

1426 *Secondly*, because I do not accept GetSwift's Variation Theory, I do not accept GetSwift's second and third contention that the trial period ended no earlier than 17 July 2017 and no later than 25 July 2017. The trial period could not have commenced (or alternatively ended) in circumstances where such an integral aspect of the GetSwift's Platform – namely, the ability

[2162] Prospectus (GSW.1001.0001.0478) at 0486.

to import and route jobs – had not yet taken place and could not have taken place due to the limitations in the GetSwift platform.

1427 *Thirdly*, I do not regard the absence of an express termination by APT in writing to be detrimental to ASIC's case. Instead, on the evidence, I am satisfied that APT had ceased engaging with GetSwift by 17 July 2017. As described above (at [482]–[491]), it appears that Mr Macdonald first learnt that APT had not commenced their trial on 8 July 2017 when he stated, in an email to Ms Noot on 9 July 2017, that "[t]hey have not used GetSwift for a month which *tells me they have dropped off*" (emphasis added): see [485]. Further, on 10 July 2017, Mr Clothier (GetSwift's Customer Success Manager) asked Mr White whether APT was happy with the trial, but never heard back: see [489]–[491]. The evidence reveals that Mr White "did not contact anyone at GetSwift after the date of that email" due to, what in his opinion, appeared to be "GetSwift's inability to provide [APT] the basic functionality of importing data to even start the trial and their lack of communication": see [489]. Further, on 17 July 2017, Mr Macdonald asked Mr Clothier in an email whether there was "any word back from [APT] and what they needed *to get their trial underway*?" (emphasis added), to which Mr Clothier replied that he had called and emailed but that there was no response: see [491]. From this date onwards, as confirmed by GetSwift's Weekly Transaction Reports, it can be readily concluded that APT had ceased engaging with GetSwift.

1428 *Fourthly*, GetSwift's contention that "there is no evidence that the customisation milestones" were not met is incorrect. The so-called "customisation milestones" included the ability for APT to import all necessary data for each job, set up specifications for a vehicle and create routes: see [462]–[464]. Mr White said that, as at 10 July 2017, he had not uploaded, entered or routed any jobs on the GetSwift Platform, nor was he aware of anyone else at APT having done so: see [490]. He also said that APT had not made any deliveries using the GetSwift Platform as at the date of his affidavit, that is, by 12 September 2019: see [490]. This is corroborated by GetSwift's Weekly Transaction Reports, which show GetSwift made no deliveries for APT in 2017: see [492]. Finally, the minutes of an 8 August 2017 meeting circulated to Messrs Hunter and Macdonald record that as at that time, the routing algorithm for APT was not in place: see [491]. On a related note, GetSwift's contention that Mr White did not give evidence that he personally encountered any difficulty in logging on to the

GetSwift Platform and entering jobs after 5 June 2017,[2163] is also incorrect. Mr White did give evidence of this nature (see [490]), which was not challenged and was not subject to any limitation.

1429 Finally, as foreshadowed above (at [477]), there remains some dispute as to the demonstration provided by Mr Kahlert to Mr Nguyen, which emerged during the cross-examination of Mr Nguyen: see [478]–[479]. Mr Macdonald relies on this "demonstration" as evidence that "any problems with the .csv file … had been rectified".[2164] The issue, however, is that Mr Nguyen appears to have been under a misapprehension about what it was he saw during Mr Kahlert's demonstration. I am satisfied that it is more probable than not that the demonstration which Mr Kahlert provided Mr Nguyen was actually a demonstration of deliveries made by Lion Dairy and Drinks (a mutual customer of GetSwift and APT). This would explain the reference to "Lion" in Mr Kahlert's email: see [478]. Mr Nguyen's misapprehension is best demonstrated by reference to Mr White's unchallenged affidavit evidence. As Mr White (APT's Finance Manager) explained (see [480]), he became aware that one of APT's customers, Lion, was using the GetSwift Platform to monitor deliveries of its products to merchants. Mr White explained that Lion staff had provided APT with login details so that they could also log in to the GetSwift portal. This provided Mr White with an understanding of how the GetSwift Platform operated. He noted that APT did not have any dealings with GetSwift in relation to the arrangement with Lion: see [480]. Given that GetSwift had not recorded a single delivery for APT in 2017, it is more likely than not that the trucks being GPS tracked (as described by Mr Nguyen at [479]) were in fact trucks using devices which Lion had loaned to APT drivers to show them how Lion's subscription to the GetSwift Platform worked. On this basis, I am satisfied that Mr Kahlert had used the login details which Lion had provided to APT in order to view the GetSwift Platform. Therefore, no weight can be placed on Mr Nguyen's recollection of the demonstration as evidence that any problems with the *.csv file* had been rectified.

[2163] GCS at [530].
[2164] MS at [287].

1430 For completeness, I note that there are two additional factual matters raised by Mr Macdonald which are relevant to the existence of the APT No Financial Benefit Information.

1431 *First*, Mr Macdonald says that after 7 June 2017, there was no correspondence from APT to GetSwift. As such, he submits that "if the problem had not been rectified, one would expect there to be evidence of such correspondence".[2165] However, Mr White directly addressed this issue, stating, "[g]iven [GetSwift's] inability to provide [APT] the basic functionality of importing data to even start the trial and their lack of communication, I did not respond to Kurt Clothier's [10 July 2017] email and did not contact anyone at [GetSwift] after the date of that email": see [489].

1432 *Secondly*, Mr Macdonald incorrectly quotes Mr Clothier as having stated that "he had observed that APT had been *using* the platform" (emphasis added),[2166] when in fact, Mr Clothier stated, "I see there a few *users* and would like to know if you are happy with the trial" (emphasis added): see [489]. The difference is subtle but significant. In the circumstances, it is more likely that Mr Clothier meant that he had seen that APT had been set up with a few user profiles on the GetSwift Platform. For example, it is likely that Mr Wakeham had been set up as a "user" when he had previously attempted to important the *.csv file*: see [469]. The fact that APT had not been using the platform is consistent with GetSwift's Weekly Transaction Reports which show no APT deliveries (see [492]), and Mr White's evidence to the same effect (see [489]–[490]). Indeed, there is no document in evidence that shows APT "used" the GetSwift Platform to make a single delivery.

1433 In summary then, I am satisfied to the requisite standard that each of the factual circumstances of the APT No Financial Benefit Information existed. For completeness, I should note that there is no need for me to make a specific finding in respect of factual circumstance (a) as to whether the free trial period under the APT Agreement had not yet commenced, or whether it had commenced, but not yet ended. That distinction, to my mind, is immaterial, and in any event, it does not matter. At the end of the day, the APT Agreement was varied in accordance

[2165] MCS at [286].
[2166] MCS at [295].

with the 4FASOC (at [81]). That fact, in and of itself, is sufficient for me to be satisfied as to the existence of factual circumstance (a).

Awareness

1434 Neither Mr Hunter nor Mr Macdonald advanced submissions to dispute directly their awareness of factual circumstances (a) and (b). I note that I am satisfied that Mr Macdonald knew of these matters by reason of his involvement in the drafting and signing of the APT Agreement (see [450]–[456]) and receiving Mr White's email on 18 May 2017 advising him that "we require our trial period to be extended until such time that we are able to import and route jobs": see [463]. On the documentary record, however, there is no evidence Mr Hunter knew of either of these matters given he was not copied in to the relevant correspondence (although, this is ultimately not of any significance, given the materiality of the APT No Financial Benefit Information is captured by factual circumstances (c) and (d)).

1435 Mr Hunter submits that he was not aware of factual circumstances (c) and (d) of the APT No Financial Benefit Information as at 17 July 2017 because, on the evidence, he was not the executive responsible for the relationship with APT, and there is no basis for an inference that the Executive Chairman of a company knows every detail of each of the company's dealings with each of its clients. Further, Mr Hunter says that while his email of 22 January 2018 (see [497]) supports an inference that, by 2018, he was aware that APT was not actively using the GetSwift platform, he highlights that this does not support the conclusion that he knew or believed that APT had never made any deliveries using the GetSwift platform.[2167]

1436 Similarly, Mr Macdonald submits that he did not have actual knowledge of factual circumstances (c) and (d), or the fact that any difficulties being encountered by APT were other than temporary.[2168] Indeed, in respect of factual circumstance (d), Mr Macdonald says ASIC has not established he knew APT had ceased engaging with GetSwift until, at the earliest, 22 January 2018. Prior to this date, Mr Macdonald says the evidence is consistent with his understanding that the relationship with APT was continuing, subject to technical difficulties.

[2167] HCS at [135]–[137].
[2168] MCS at [315(c)].

Even on 22 January 2018, Mr Macdonald says that it was his understanding APT had "paused using" the platform, implying a belief that this was not a permanent state of affairs: see [496].

1437 These submissions are of no moment. The following evidence strongly supports the conclusion that Mr Hunter and Mr Macdonald were aware of the APT No Financial Benefit Information as at 17 July 2017:

(1) Mr Hunter and Mr Macdonald received Weekly Transaction Reports, with each Weekly Transaction Reports showing that GetSwift had made zero deliveries for APT (see [492]–[497]);

(2) On 9 July 2017, Mr Macdonald, in an email to Ms Noot, noted that the lack of APT's use of the platform was telling that they had "dropped off" (see [485]);

(3) On 10 July 2017, Mr Macdonald and Mr Hunter exchanged emails regarding the loss of APT, in which Mr Hunter stated that they could not sign up clients "just to have our back office lose them" and Mr Macdonald responded, stating "[t]hey did have credit but never used it. Steph and Jamila were responsible with on boarding them and there was zero follow up and zero care for making sure they were ok" (see [486]–[487]); and

(4) Despite Mr Clothier's unsuccessful, and likely optimistic, attempts to contact Mr White in July, Mr Clothier responded to Mr Macdonald's request for updates regarding APT, stating "I called and emailed Tim as well as Alex but no response yet" (see [489]–[491]).

1438 To my mind, in the absence of other specific evidence, this evidence supports a finding that both directors knew APT had not made any deliveries (factual circumstance (c)), and that APT had ceased engaging with GetSwift (factual circumstance (d)).

1439 Accordingly, I am satisfied that both directors were aware by 17 July 2017 that APT had ceased engaging with GetSwift. This accords with the minutes circulated from the "7-8 August Program All Hands Meeting", which labelled the "deprioritiz[ation] [of] All Purpose Transport" a "key decision": see [491].

1440 Even if I am wrong about this, Mr Macdonald and Mr Hunter were clearly aware that APT had ceased using the GetSwift Platform by the time he received the Weekly Transaction Reports on 26 November 2017, which once again recorded no use of the GetSwift Platform by APT: see [494]. Indeed, by 22 January 2018, Mr Hunter was talking to Mr Macdonald in terms of APT having "terminated": see [497].

1441 By reason of the knowledge of Mr Macdonald and Mr Hunter (to a more limited extent), I am satisfied that GetSwift was also aware of the APT No Financial Benefit Information as at 17 July 2017.

General availability

1442 In the absence of GetSwift addressing whether the APT No Financial Benefit Information was generally available, I am satisfied, in the light of my discussion above (see [1143]), that the APT No Financial Benefit Information was not generally available. It is wholly unrealistic to assume that investors could deduce, from the Prospectus, financial disclosures, or otherwise, that in the context of the previously announced APT Agreement, APT had ceased engaging with GetSwift, or that there was no financial benefit to GetSwift from the APT Agreement.

Materiality

1443 In respect of why it says the APT No Financial Benefit Information was not material, GetSwift raise similar arguments to those already discussed above: *first*, it is said that the APT No Financial Benefit Information ceased to exist (or "became stale") after 17 July 2017 on the basis that the 36-month initial term had commenced;[2169] and *secondly*, it is said that any qualifying information could not have had a material effect on the price or value of GetSwift's shares in circumstances where the expected benefits of the contract were themselves immaterial.[2170]

1444 The *first* of these submissions proceeds on a false premise, given that I am satisfied factual circumstances (a) and (d) of the APT No Financial Benefit Information existed and that the 36-month initial term had not commenced; that is, I rejected GetSwift's Variation Theory, meaning the APT Agreement did not remain on foot: see [1421]–[1433]. The *second* contention is repetitious of GetSwift's Absence of Quantifiable Benefits Contention and, for the reasons outlined above (at [1198]–[1211]), I do not find this is of merit.

1445 Furthermore, Mr Macdonald makes two broad submissions as to why the APT No Financial Benefit Information was not material.[2171] *First*, concerning factual circumstances (a) and (c),

[2169] GCS at [561]–[563].
[2170] GCS at [564].
[2171] MCS at [308]–[311].

Mr Macdonald submits that the fact the trial was yet to commence and deliveries were yet to occur was immaterial in circumstances where there was no basis to believe the trial period was unlikely to commence upon resolution of technical issues. *Secondly*, in respect of factual circumstance (b), it is said that the initial term having not commenced was immaterial given the generally available information that contracts could be terminated at any time and that even after the completion of a trial period, GetSwift would only get revenue from its clients to the extent they chose to use the platform.[2172]

1446 These submissions also do not withstand scrutiny. As to the *first* contention, I reject that there was no basis to believe that the trial period was unlikely to commence upon resolution of the technical issues. As the evidence reveals, Mr Macdonald first learnt that APT had disengaged from GetSwift on 8 July 2017: see [482]. On 9 July 2017, he stated, "[t]hey have not used GetSwift for a month which *tells me they have dropped off*" (emphasis added): see [485]. Moreover, by 17 July 2017, Mr Macdonald asked Mr Clothier in an email whether there was "any word back from [APT] and what they needed to get their trial underway?", to which he replied that he had called and emailed but that there was no response: see [491]. As to his *second* contention, that is simply a repetition of GetSwift's Terminable at Will Contention.

1447 Finally, I should note that as a defence to ASIC's claim that the APT No Financial Benefit Information was not disclosed until the commencement of this proceeding, GetSwift, Mr Hunter and Mr Macdonald rely on GetSwift's Market Update of 9 February 2018 (see [1056]). That update responded to, among other things, a query from ASIC as to whether, in relation to any contracts and/or partnerships which GetSwift had announced to the market, any clients had ceased using the GetSwift platform without formally terminating their contract or partnership. In its response, GetSwift said that APT was not presently using its platform and that it was "unaware" whether this was "temporary or permanent". While informative, the equivocal nature of this statement does not disclose the APT No Financial Benefit Information, nor does it disclose (with any particularity) that APT had ceased engaging with GetSwift, given that it suggests this might only be "temporary".

[2172] MCS at [307(a)–(c)].

1448 To this end, I accept GetSwift, Mr Hunter and Mr Macdonald's admissions in the alternative that from 17 July 2017 until the date this proceeding, GetSwift did not notify the ASX of the APT No Financial Benefit Information.[2173]

1449 I am therefore satisfied that the APT No Financial Benefit Information was material. Indeed, it would have conveyed to investors – notably two months after the "price sensitive" APT Announcement had been made – that: (a) the trial period for the APT Agreement had not yet commenced (or alternatively not yet ended); (b) APT had not made a delivery on the platform; and (c) APT had ceased engaging with GetSwift. In this sense, the APT No Financial Benefit Information was important contextual and qualifying information that would have conveyed to investors that it was unlikely GetSwift would capture any benefits under the APT agreement as announced in the APT Announcement. It would also have served to undermine earlier announcements by GetSwift that the platform was being used to the satisfaction of its clients.

Conclusion

1450 I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the APT No Financial Benefit Information from 17 July 2017 until the commencement of this proceeding.

H.3.5 *CITO Transport Pty Ltd*

1451 ASIC's case in respect of CITO concerns GetSwift, Mr Hunter and Mr Macdonald.

CITO Agreement

1452 On 15 May 2017, CITO signed the CITO Agreement with GetSwift: see [528].

CITO Announcement

1453 Each of the relevant defendants admitted that on 22 May 2017, GetSwift submitted the CITO Announcement to the ASX, entitled "CITO Transport sign commercial agreement with GetSwift", which stated that GetSwift had signed an "exclusive commercial multi-year agreement" with CITO. The ASX released the CITO Announcement as "price sensitive". The documentary record also reveals that Mr Mison sent an email to Mr Hunter, Mr Macdonald

[2173] Defences at [84].

and Mr Eagle, stating "[a]ll, ASX Announcement released" (which attached the final copy of the ASX announcement): see [534]. Given the involvement of Mr Hunter and Mr Macdonald in the release of the CITO Announcement, including Mr Macdonald directing the announcement be provided to the ASX (see [532]),[2174] and Mr Hunter admitting that he contributed to drafting the announcement,[2175] I am satisfied that Mr Hunter and Mr Macdonald were aware of the contents of the CITO Announcement.

CITO Agreement Information

Existence

1454 ASIC contends that, when the CITO Announcement was released to the market on 22 May 2017, the following circumstances existed: (a) CITO had not undertaken any proof of concept, or trial phase, for the GetSwift Platform; (b) other than signing the CITO Agreement, CITO had not indicated to GetSwift when, if at all, it proposed to commence using the GetSwift Platform to conduct deliveries; (c) the CITO Agreement was not a multi-year agreement; and (d) the CITO Agreement had no fixed term (collectively, the **CITO Agreement Information**).

1455 Factual circumstances (a), (b) and (d) of were not in issue and were admitted by GetSwift, Mr Hunter and Mr Macdonald.[2176]

1456 In respect of factual circumstance (c), GetSwift submits that the CITO Agreement was unlimited as to its term; that is, it would continue unless and until one or other of the parties terminated it. Accordingly, it says that it was a multi-year agreement, subject to the exercise of the parties' rights of termination.[2177] This submission should be rejected. The CITO Agreement had no fixed term. As discussed above (at [525]), Mr Calleja said that he crossed out the point in the term sheet referring to a term of 36 months (which would have made the CITO Agreement a multi-year agreement), instead inserting "N/A" on the basis that he did not want CITO to be locked into a 36 month contract with GetSwift (or, on his evidence, any contract at all). GetSwift had no assurance that the CITO Agreement would extend for any particular

[2174] Macdonald Defence at [271(a)(iv)].
[2175] Hunter Defence at [347(f)].
[2176] 4FASOC at [98].
[2177] GCS at [668].

period; therefore, there can be no sound basis for the reference to "multi-year agreement". I am satisfied that the CITO Agreement was not a multi-year agreement.

1457 For completeness, I note that Mr Hunter, in his submissions, appears to put into contest factual circumstance (b), stating that he had been copied into or forwarded several communications that indicated CITO was interested in using the GetSwift Platform: see [518] and [522].[2178] But this submission goes nowhere. Mr Hunter admitted this circumstance in his defence,[2179] and did not seek leave to amend his pleadings to withdraw this admission. In any event, it does not follow that because CITO indicated it was interested in using the GetSwift Platform, it was also indicating when (if at all) it proposed to commence using the GetSwift Platform to conduct deliveries.

Awareness

1458 GetSwift admitted that it was aware of the CITO Agreement Information, other than factual circumstance (c) (which it said did not exist).[2180] Neither Mr Hunter nor Mr Macdonald advanced submissions in respect of their awareness of the CITO Agreement Information. However, given that both were involved in the drafting and negotiation of the CITO Agreement (see [502]–[528]), I am satisfied that each was aware of the CITO Agreement Information from 22 May 2017. It follows that GetSwift was also aware of element (c) from this date.

General availability

1459 GetSwift admitted that the CITO Agreement Information (other than factual circumstance (c)) was not generally available, but did not contend that factual circumstance (c) was generally available.[2181] This is presumably on the basis that it disputed that the CITO Agreement was a "multi-year agreement". Having established that it was not a multi-year agreement (see [1456]), and in the absence of the CITO Announcement, or any other public source, making this clear, I am satisfied that factual circumstance (c) was not generally available.

[2178] HCS at [154].
[2179] Hunter Defence at [98].
[2180] GetSwift Defence at [98]; GCS at [667].
[2181] GCS at [667].

Materiality

1460 GetSwift advanced a number of familiar submissions as to why the CITO Agreement Information was not material.

1461 *First*, GetSwift submits that the share price movements following the CITO Announcement demonstrate that the benefits expected to flow to GetSwift as a result of the CITO Agreement were not material. Indeed, GetSwift highlight that on the day of the announcement, there was a 7.5% increase in its share price, but that this rebounded the following day.[2182]

1462 *Secondly*, GetSwift contends that the CITO Announcement did not state the expected benefits to GetSwift from the CITO Agreement, and that the CITO Agreement Information was not material given the information that was already available to the market concerning other agreements with Enterprise Clients (namely the CBA Announcement (see [362]), GetSwift's April Appendix 4C (see [31]) and the Investor Presentation released 9 May 2017 (see [27]).[2183]

1463 *Thirdly*, it is said that GetSwift's entry into a new industry "vertical" cannot assist ASIC's case for two reasons:

(1) GetSwift submits that investors already knew that GetSwift had entered into the transport industry (by reason of the announcement of the APT Agreement, which described APT as "Queensland's only true specialized transport solutions company" and stated that GetSwift had "brought into its ecosystem an additional group in its expanding industry verticals").[2184]

(2) GetSwift places reliance on Mr Vogel's statement that GetSwift's entry into the CITO Agreement had no impact on his decision to invest in GetSwift,[2185] given he did not understand "how transport companies fitted into [GetSwift's] business model". Indeed, he "thought that the main use of the GetSwift software was for end-branded customer companies such as food service providers/restaurants that needed their product delivered to homes, not logistics companies".[2186]

[2182] GSW.0003.0005.0325 at 3.
[2183] GCS at [670]–[672].
[2184] GCS at [674(a)]; APT Announcement (GSW.1001.0001.0476).
[2185] T831.11–16 (Day 11).
[2186] GCS at [674(b)]; Vogel Affidavit (GSW.0009.0013.0001_R) at [14]–[15].

1464 *Fourthly*, GetSwift submits that ASIC has failed to address the temporal aspects of its case, including the impact of the 2018 ASX Market Update Information (as defined at [1058]), or the fact that GetSwift entered into new partnerships with much larger customers, such as NA Williams, Yum and Amazon.[2187]

1465 The *first* and *second* of these submissions are a reprise of GetSwift's Share Price Contention and Absence of Quantifiable Benefits Contention, which I have already discussed, and rejected: see [1230]–[1256] and [1198]–[1211].

1466 As to the *third* submission, it is notable that ASIC do not rely on the entry into a new vertical as the means to transmogrify the CITO Announcement into a material one. Given this, GetSwift's reliance placed on the fact that it may already have been apparent to the market that GetSwift was entering the transport industry is neither here nor there. Further GetSwift mischaracterise the evidence of Mr Vogel. His concession was simply that at the time he made the recommendation to invest in GetSwift, he did not "understand how a transport company such as CITO fitted into GetSwift's business model".[2188] Indeed, in the course of his evidence, he clarified that "he was aware that the GetSwift software will be used to assist end users in optimising their routes … [a]nd obviously, transportation company fits into that supply chain", noting instead that his "query was more specifically around the revenue sharing arrangement".[2189]

1467 Although the *fourth* contention mirrors the Continuing Periods Contention, it is necessary to say something about the 9 February 2018 Market Update (see [1056]) and the 19 February 2018 Market Update (see [1057]).[2190] While general statements were made in these announcements concerning trial periods (see [1399]), the only specific reference to CITO appears in the latter update, where it was said that CITO is "not presently using the platform" and that "GetSwift is unaware whether this is temporary or permanent". As noted above in respect of APT (see [1416]), I do not consider that general statements concerning trial periods assist GetSwift, nor do any specific statements concerning CITO in these documents have any relevance to the CITO Agreement Information. To this end, I am satisfied that nothing in these

[2187] GCS at [677].
[2188] T831.14–16 (Day 11).
[2189] T831.31–35 (Day 11).
[2190] GCS at [677].

updates impact upon the general availability or materiality of the information and that GetSwift remained obliged to disclose the CITO Agreement Information until the date of commencement of this proceeding.

1468 I am satisfied that GetSwift, by releasing the "price sensitive" CITO Announcement, which stated that GetSwift had entered into a multi-year agreement with CITO, engendered and reinforced investor expectations as set out in the Prospectus, the Agreement After Trial Representations and the First Quantifiable Announcement Representations when the reality was as follows: no proof of concept had been completed; it was unclear whether CITO would use GetSwift's services; and there was no fixed term. Indeed, I am amply satisfied that the CITO Agreement Information would have conveyed to investors that there was significantly less certainty that the benefits under the CITO Agreement would be captured, and that this would have influenced investors in making a decision as to whether to acquire or dispose of GetSwift shares.

1469 GetSwift, Mr Hunter and Mr Macdonald admitted that GetSwift did not notify the ASX of the CITO Agreement Information from 22 May 2017 until the date of issue of this proceeding.[2191]

Conclusion

1470 Having established the necessary elements of a continuous disclosure contravention, I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the CITO Agreement Information from 22 May 2017 until the commencement of this proceeding.

CITO No Financial Benefit Information

Existence

1471 As at 1 July 2017, ASIC contended that the following factual circumstances existed: (a) CITO had not at any time requested or been provided with any of the services referred to in the CITO Agreement; (b) CITO had not at any time sought access to or been provided with access to the GetSwift Platform; (c) CITO had not at any time made any deliveries using the GetSwift

[2191] Defences at [100].

Platform; and (d) CITO had not at any time made any payment to GetSwift (collectively, the **CITO No Financial Benefit Information**).[2192]

1472 Contrary to what is pleaded in its defence, GetSwift admitted in its submissions that factual circumstances (c) and (d) existed.[2193] It is difficult to understand why Mr Hunter and Mr Macdonald have not done the same. In any event, I am satisfied that they exist by reason of Mr Calleja's evidence and the lack of any evidence to the contrary: see [535].

1473 As to factual circumstance (a) of the CITO No Financial Benefit Information, GetSwift submits that this information did not exist on the basis that the alleged training that GetSwift provided to CITO on 16 May 2017 involved the "use of GetSwift's proprietary software platform" or, alternatively, was "consultancy advice" for the purposes of cl 3 of the CITO Agreement, and accordingly constituted the provision to CITO of a "Service" under that agreement.[2194] ASIC contends that training was never provided, and hence, CITO was never provided with the services referred to in the CITO Agreement.

1474 I have already summarised the evidence relevant to the dispute as to whether training was in fact provided to CITO: see [542]–[558]. There are two difficulties with accepting GetSwift's contention regarding the alleged training. *First*, none of the contemporaneous documents reveal that anyone at CITO (as opposed to PMI) was given access to the GetSwift Platform or that any training took place. This is consistent with the evidence of Mr Calleja and Mr Jenkinson: Mr Calleja could not recall anybody at CITO receiving any training of the GetSwift Platform; and Mr Jenkinson, despite being pressed, remained quite firm in his belief he they did not recall receiving training or using the software: see [553]–[556]. For example, when Mr Jenkinson was taken to an email of 16 May 2017 which stated, "session overall was a success…" and asked "[a]nd you recall now, having seen that email, that you did in fact have some training with GetSwift in relation to its system on 16 May 2017?", he replied "[n]o, I do not": see [553]–[554]. When the question was repeated, phrased in a slightly different manner, Mr Jenkinson responded, with some clarity: "No. I'm pretty sure I would remember if I received training": see [554].

[2192] FASOC at [102].
[2193] GCS at [684].
[2194] GCS at [679].

1475 *Secondly*, the evidence does not reveal that anyone at CITO was given training *by GetSwift*. The email referred to by GetSwift that the "session overall was a success" is inconclusive (see [552]). That email refers to demonstrations that were provided by PMI ("from our end") to CITO, as opposed to training or a demonstration emanating from GetSwift to CITO. To the extent the documents do refer to training, it seems more likely than not that training was given by PMI. As Mr Jenkinson said, CITO had no reason to use the GetSwift Platform as part of the warehousing arrangement with PMI, FRF Couriers, GetSwift and CITO: see [536]–[537]. At most, Mr Jenkinson might have been present during an *online demonstration* of the GetSwift Platform, given that is what the documents to which Mr Calleja and Mr Jenkinson were taken refer to;[2195] however, that is different to *software training*: see [553]–[557]. Even if I was satisfied that this was the case, there is no evidence that the online demonstration involved CITO being given "access to the GetSwift Platform", nor is it likely, given Mr Jenkinson's evidence, that he was ever asked to install the GetSwift software or given access to it: see [556].

1476 On the basis of this evidence, and in the absence of any direct evidence to the contrary, I accept that it is more probable than not that training was *not* provided to CITO by GetSwift. It flows that factual circumstance (a) is made out – the evidence establishes that at no time had CITO requested or been provided with any of the services referred to in the CITO Agreement.

1477 Further, GetSwift denies that factual circumstance (b) existed for the following reasons. *First*, it is said that CITO entered into the agreement with GetSwift in order to see the GetSwift platform in action and to evaluate whether the software would be useful for CITO's business, and since that required CITO to have access to the platform, it should be inferred that CITO did in fact obtain access to the software.[2196] This is said to be supported by the statements Mr Calleja made to the ATN praising GetSwift's technology in late May 2017 (see [538]–[541]) *Secondly*, it is said that the contemporaneous communications between GetSwift, PMI and CITO leading up to 16 May 2017 support a finding that GetSwift conducted training on the GetSwift platform on that date and that CITO participated in that training session, and it should

[2195] T611.33 (Day 8); T617.1–10; T626.38–40 (Day 8).
[2196] GCS at [681].

be inferred that CITO was provided with access to the GetSwift platform for the purposes of undertaking that training.[2197]

1478 These submissions suffer from the same deficiencies as indicated above. I do not consider training was provided to CITO. Further, GetSwift's reliance on comments made to the ATN, including Mr Calleja's statements that he "believe[d] in" the GetSwift Platform and regarded the technology as "outstanding",[2198] do not take its case further: see [538]. All this evidence establishes is that Mr Calleja may have seen GetSwift's platform in action, which is very different to being provided access to the platform.

1479 I am satisfied that each of the factual matters comprising the CITO No Financial Benefit Information existed.

Awareness

1480 Turning to the issue of awareness, Mr Hunter submits that the evidence does not support a finding that he was himself was aware of the CITO No Financial Benefit Information.[2199] Further, Mr Hunter submits that it cannot be inferred that the Executive Chairman of the company is aware of all of the details of the company's dealings with any particular customer, particularly when in relation to CITO, the client relationship was with Mr Macdonald, and not with Mr Hunter.[2200]

1481 While I accept that Mr Macdonald had primary carriage of the relationship with CITO, the evidence reveals that Mr Hunter had knowledge of the CITO Agreement (see [528]), the agreement between GetSwift and FRF Couriers dated 7 June 2017 (see [529]–[531]), and GetSwift's arrangement with PMI, including that CITO would not be performing any deliveries for PMI under the arrangement (see [518]). Nevertheless, I have not reached the level of satisfaction to conclude Mr Hunter was aware of the CITO No Financial Benefit Information from 1 July 2017. I note that it is unrealistic to think that Mr Hunter did not become aware of CITO No Financial Benefit Information until the date on which this proceeding was commenced, but to pinpoint a date on the evidence before me would be purely speculative.

[2197] GCS at [682].
[2198] GCS at [645], and [681].
[2199] HCS at [155].
[2200] HCS at [155]–[156].

1482 The position with respect to Mr Macdonald is different. He makes no submissions as to his awareness of the CITO No Financial Benefit Information. For the reasons canvassed above, including Mr Macdonald's involvement in the negotiation of the CITO Agreement (and other related agreements) (see [502]–[528] and [529]–[531]) as well as maintaining some control and involvement in subsequent events involving CITO thereafter (see [551]–[552]), I am satisfied that he was aware of the CITO No Financial Benefit Information.

1483 By reason of the knowledge of Mr Macdonald, I am satisfied that GetSwift was aware of the CITO No Financial Benefit Information as at 1 July 2017.

General availability

1484 GetSwift admitted, in its closing submissions, that factual circumstances (c) and (d) of the CITO No Financial Benefit Information were not generally available.[2201] While no submissions have been advanced as to factual circumstances (a) and (b), I am satisfied that they were not generally available, on a similar basis to my discussion above (see [1143]). It would be quite unrealistic to think that investors could deduce, from the Prospectus, financial disclosures or otherwise, those specific parts of the CITO No Financial Benefit Information.

Materiality

1485 In parallel to its previous contentions, GetSwift submits that the expected benefits to GetSwift from the CITO Agreement were not material, as evidenced by the lack of a material share price reaction to the CITO Announcement: see [1461].[2202] GetSwift also contend that the qualification information could have no material impact on GetSwift's share price in circumstances where the expected benefits from the contracts were themselves not material.[2203] Finally, GetSwift says that ASIC has failed to establish that the CITO No Financial Benefit Information was material for largely the same reasons discussed in relation to the CITO Agreement Information: see [1461]–[1464].[2204] These submissions mirror GetSwift's Share Price Contention and Absence of Quantifiable Benefits Contention, which for the reasons that

[2201] GCS at [684].
[2202] GCS at [686].
[2203] GCS at [686].
[2204] GCS at [687].

I have already provided, do not advance its case further, and have otherwise been disposed of in relation to the CITO Agreement Information.

1486 Finally, I should note that as a defence to ASIC's claim that the CITO No Financial Benefit Information was not disclosed until the commencement of these proceedings, GetSwift, Mr Hunter and Mr Macdonald draw upon GetSwift's Market Update of 9 February 2018 (see [1056]). In that announcement, it stated that CITO was not presently using its platform and that it was unaware whether this was temporary or permanent. For reasons expressed above (at [1447]), this does not assist GetSwift. To this end, I accept GetSwift, Mr Hunter and Mr Macdonald's admissions in the alternative that from 1 July 2017 until the date of issue of this proceeding, GetSwift did not notify the ASX of the CITO No Financial Benefit Information.[2205]

1487 Having dealt with each of GetSwift's arguments, I should make clear that the CITO No Financial Benefit Information was material. The "price sensitive" CITO Announcement engendered and reinforced investor expectations, without the subsequent benefit of the important contextual and qualifying CITO No Financial Benefit Information. Indeed, many weeks after the CITO Announcement had been made to the market, GetSwift was aware that CITO had not used or trialled GetSwift's Platform, nor had it made deliveries: see [1472]–[1479]. As such, the CITO No Financial Benefit Information would have informed investors that the CITO Agreement would not proceed in substance and that GetSwift was unlikely to capture any benefits under that agreement as expressed in the CITO Announcement.

Conclusion

1488 Having established each of the four elements of ASIC's continuous disclosure claim, I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the CITO No Financial Benefit Information from 1 July 2017 until the commencement of this proceeding.

H.3.6 *Hungry Harvest LLC*

1489 ASIC's case in respect of Hungry Harvest concerns GetSwift and Mr Macdonald only.

[2205] Defences at [104].

Hungry Harvest Agreement

1490 On or around 22 May 2017, GetSwift and Hungry Harvest entered into the Hungry Harvest Agreement: see [565].

Hungry Harvest Announcement

1491 GetSwift and Mr Macdonald admitted that on 1 June 2017, GetSwift submitted the Hungry Harvest Announcement to the ASX, entitled "Hungry Harvest and GetSwift sign exclusive partnership", which stated that GetSwift had signed an "exclusive commercial multi-year partnership" with Hungry Harvest in the USA, and which was marked as "price sensitive": see [572].[2206]

1492 I note for completeness that it is of no moment that Mr Macdonald made only "minor changes" to the Hungry Harvest Announcement and did not have a significant role in its drafting.[2207] I am satisfied Mr Macdonald directed and authorised the transmission of the Hungry Harvest Announcement if there were no material objections from the other directors (see [569]),[2208] had knowledge of the content of the Hungry Harvest Announcement and was aware that it had been submitted to the ASX because he received email confirmation from Mr Mison which attached a copy of the announcement: see [572].

Hungry Harvest Agreement Information

Existence

1493 ASIC alleges that, at the time the Hungry Harvest Announcement was released on 1 June 2017, the following factual circumstances existed: (a) the Hungry Harvest Agreement contained a trial period, ending on 1 July 2017; (b) the parties were still within the trial period; (c) Hungry Harvest was permitted, at any time in the period up to seven days prior to the expiration of the trial period, to terminate the Hungry Harvest Agreement by giving notice in writing; and (d) if Hungry Harvest terminated the Hungry Harvest Agreement at any time in the period up to seven days prior to the expiration of the trial period, the three-year term of the Hungry Harvest

[2206] 4FASOC at [116].
[2207] MCS at [353]–[356].
[2208] Macdonald Defence at [271(a)(v)].

Agreement would not commence and it was not obliged to use GetSwift exclusively for its last-mile delivery services (collectively, the **Hungry Harvest Agreement Information**).

1494 The existence of these circumstances was not in issue and was admitted by GetSwift and Mr Macdonald.[2209]

Awareness

1495 GetSwift admitted that it was aware of the Hungry Harvest Agreement Information.[2210] Mr Macdonald did not advance submissions as to his awareness, but it is evident from the documentary record that Mr Macdonald was involved in the negotiations of the Hungry Harvest Agreement and received a copy of the final agreement: see [561]–[567]. Accordingly, I am satisfied Mr Macdonald was aware of the Hungry Harvest Agreement Information from 1 June 2017.

General availability

1496 GetSwift contends that factual circumstances (c) and (d) were generally available as they could be deduced from the Prospectus, which I reject for the reasons as outlined above (at [1117]–[1141]). Otherwise, GetSwift did not dispute that the Hungry Harvest Agreement Information was generally available.[2211] For completeness I note that I find factual circumstances (a) and (b) of the Hungry Harvest Agreement Information were not generally available for the reasons outlined at [1117]–[1141], given that investors could not have discerned that the Hungry Harvest Agreement contained a trial period, which the parties were still within.

Materiality

1497 GetSwift repeats its Absence of Quantifiable Benefits Contention, Continuing Periods Contention and Share Price Contention, highlighting relatively insignificant share price movements at the time of the Hungry Harvest Announcement.[2212] Indeed, it is said that there was a mere 2.4 per cent increase in GetSwift's share price on the day of the Hungry Harvest Announcement and a mere 4.8 per cent increase five trading days after the announcement. There is no need for me to add to this already voluminous judgment by addressing these points

[2209] Defences at [118].
[2210] GCS at [732].
[2211] GCS at [733].
[2212] GCS at [736]–[742].

any further, other than to say that my reasons, as I have explained above, apply equally in respect of the Hungry Harvest Agreement Information. Indeed, when read in the light of the "price sensitive" Hungry Harvest Announcement (and the expectations engendered or reinforced by that announcement), I am satisfied that the Hungry Harvest Agreement Information would have conveyed to an investor that it was significantly less certain that the benefits under the Hungry Harvest Agreement would be captured.

1498 For completeness, I should note that as a defence to ASIC's claim that the Hungry Harvest Agreement Information was not disclosed until the commencement of this proceeding, GetSwift and Mr Macdonald rely upon the 2018 ASX Market Update Information (as defined at [1058]).[2213] However, for reasons that I have canvassed above (at [1399]), this argument is of no moment. As such, I accept GetSwift and Mr Macdonald's admissions in the alternative that in the period from 1 June 2017 until the date of issue of this proceeding, GetSwift did not notify the ASX of the Hungry Harvest Agreement Information.[2214]

Conclusion

1499 In the light of the above, I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Hungry Harvest Agreement Information from 1 June 2017 until the date on which these proceedings commenced.

H.3.7 *The First Placement*

1500 There is no continuous disclosure case concerning the First Placement Information but it is necessary to set out the existence and awareness of this information, which I will refer to when I discuss ASIC's misleading and deceptive conduct claims below (at Part I).

Tranche 1 Cleansing Notice

1501 On 4 July 2017, the ASX released to the market the Tranche 1 Cleansing Notice: see [583]. While it is unclear who at GetSwift drafted the Tranche 1 Cleansing Notice, the documentary record reveals that immediately prior to it being released to the ASX, Mr Mison sent an email to Mr Hunter, Mr Macdonald and Mr Eagle, attaching the final Appendix 3B and Tranche 1 Cleansing Notice. In the email, Mr Mison stated: "I will lodge in next 10mins if no objection":

[2213] Defences at [120].
[2214] Defences at [120].

see [582]. No objections were taken. Mr Mison also forwarded confirmation that the Tranche 1 Cleansing Notice had been released by the ASX to Messrs Hunter, Macdonald and Eagle: see [586]. Accordingly, on the evidence adduced, and without any evidence to the contrary, I am satisfied that each of the directors had knowledge that the Tranche 1 Cleansing Notice had been released by the ASX.

First Placement Information

1502 GetSwift admitted that at the time the ASX released the Tranche 1 Cleansing Notice to the market on 4 July 2017, it had submitted to the ASX, and the ASX had released to the market, the Fruit Box Announcement, the CBA Announcement, the Pizza Hut Announcement, the APT Announcement, the CITO Announcement and the Hungry Harvest Announcement.[2215]

1503 Further, at the time of the Tranche 1 Cleansing Notice on 4 July 2017, GetSwift admitted that it had not notified the ASX of the following information: (a) the Fruit Box Agreement Information; (b) the Fruit Box Termination Information; (c) the CBA Projection Information; (d) the Pizza Pan Agreement Information; (e) the APT Agreement Information; (f) the CITO Agreement Information; and (g) the Hungry Harvest Agreement Information (collectively, the **First Placement Information**).[2216] In any case, I have already made individual findings in relation to each of these categories of information.

Tranche 2 Cleansing Notice

1504 On 16 August 2017, the ASX released the Tranche 2 Cleansing Notice: see [594]. Although it is unclear who at GetSwift drafted the Tranche 2 Cleansing Notice, the documentary record reveals that a number of emails were sent between Messrs Hunter, Macdonald and Eagle discussing a draft of the announcement: see [587]–[594]. Mr Mison asked the directors "[p]lease let me know if you have any queries / comments on the releases": see [587]. Mr Hunter (copied to Mr Macdonald and Mr Eagle) replied: "File the 3b of course": see [591]. Mr Eagle also responded stating: "[n]o comments my side on these docs": see [592]. Mr Mison also sent an email to Mr Hunter, Mr Macdonald and Mr Eagle, forwarding confirmation that the Tranche 2 Cleansing Notice had been released by the ASX: see [594]. Accordingly, I am

[2215] GSD at [264H].
[2216] GSD at [264I(b)].

satisfied that Messrs Hunter, Macdonald and Eagle had knowledge that the Tranche 2 Cleansing Notice had been released by the ASX, were aware of its contents and authorised it to be made.

H.3.8 *Fantastic Furniture*

1505 ASIC's case in respect of Fantastic Furniture concerns GetSwift, Mr Hunter and Mr Macdonald (in terms of the Fantastic Furniture Agreement Information) and GetSwift and Mr Macdonald (in terms of the Fantastic Furniture Termination Information).

Fantastic Furniture Agreement

1506 On or about 25 July 2017, GetSwift entered into the Fantastic Furniture Agreement: see [606].

Fantastic Furniture & Betta Homes Announcement

1507 Each of the defendants admits that on 23 August 2017, GetSwift submitted the Fantastic Furniture & Betta Homes Announcement to the ASX, entitled "GetSwift signs Betta Home Living and Fantastic Furniture", which stated that GetSwift had signed "exclusive commercial multi-year agreements" with each of Fantastic Furniture and Betta Homes: see [620].[2217] Unlike previous announcements, this announcement was not marked as "price sensitive" by the ASX.

1508 The documentary record establishes that Mr Hunter and Mr Macdonald each received email confirmation from Mr Mison on 23 August 2017 that the Fantastic Furniture & Betta Homes Announcement had been released by the ASX (which attached the final copy of the ASX announcement): see [621]. This satisfies me that Mr Hunter and Mr Macdonald each had knowledge that GetSwift had submitted the Fantastic Furniture & Betta Homes Announcement to the ASX and were aware of its contents. For completeness, I note that Mr Hunter admitted that he contributed to drafting the Fantastic Furniture & Betta Homes Announcement,[2218] and admitted that as a member of the Subcommittee, he approved its content, and authorised its transmission to the ASX.[2219] While Mr Macdonald did not make admissions to this effect, he was copied into various draft announcements concerning entry into the Fantastic Furniture

[2217] Defences at [131].
[2218] Hunter Defence 347(g).
[2219] Hunter Defence 347(h).

Agreement between 6 and 23 August 2017, he was explicitly asked to "review" a draft announcement by Mr Hunter, and he provided minor amendments immediately prior to the final version being circulated by Mr Mison: see [613]–[619].

Fantastic Furniture Agreement Information

Existence

1509 At the time of the Fantastic Furniture & Betta Homes Announcement on 23 August 2017, ASIC contended, and the relevant defendants admitted,[2220] that the following factual circumstances existed: (a) the Fantastic Furniture Agreement contained a trial period ending on 1 October 2017; (b) the parties were still within the trial period; (c) Fantastic Furniture was permitted, at any time in the period up to seven days prior to expiration of the trial period, to terminate the Fantastic Furniture Agreement by giving notice in writing; and (d) if Fantastic Furniture terminated the Fantastic Furniture Agreement at any time in the period up to seven days prior to the expiration of the trial period, the three-year term of the Fantastic Furniture Agreement would not commence and it was not obliged to use GetSwift exclusively for its last-mile delivery services (collectively, the **Fantastic Furniture Agreement Information**).

Awareness

1510 GetSwift admits that it was aware of the Fantastic Furniture Agreement Information.[2221] As to Mr Hunter and Mr Macdonald, the extensive documentary record reveals that, for instance, Mr Macdonald primarily negotiated the terms of the Fantastic Furniture Agreement and executed the term sheet on behalf of GetSwift (see [596]–[607]) and that Mr Hunter was copied into an email from Mr Nguyen to Mr Clothier of 25 July 2017, which attached an executed copy of the Fantastic Furniture Agreement (see [605]). Moreover, on 26 July 2017, Mr Macdonald sent an email to Mr Clothier, copied to Messrs Hunter and Ozovek, stating (at [610]):

> OK so the term sheet maps out a free trial for them and then makes it easy for them to roll straight into initial term upon successful trial. They do have the ability to opt out if they are not happy with the trial.[2222]

[2220] Defences at [133].
[2221] GCS at [786].
[2222] GSWASIC00014837.

1511 I am, therefore, satisfied that Mr Hunter and Mr Macdonald were aware of the Fantastic Furniture Agreement Information from 23 August 2017.

General availability

1512 Other than contending that factual circumstances (c) and (d) could be gleaned from the Prospectus, which I reject for the reasons as outlined above (at [1117]–[1141]), GetSwift did not dispute that the Fantastic Furniture Agreement Information was not generally available.[2223] For completeness, I note that I find factual circumstances (a) and (b) of the Fantastic Furniture Agreement Information were not generally available for the reasons outlined at [1117]–[1141], given that investors could not have discerned that the Fantastic Furniture Agreement contained a trial period, which the parties were still within.

Materiality

1513 GetSwift's arguments as to why the Fantastic Furniture Agreement Information was not material mirror its Absence of Quantifiable Benefits Contention, Continuing Periods Contention and Share Price Contention.[2224] Indeed, GetSwift pointed out that on the day of the Fantastic Furniture Announcement, its share price climbed "just" one per cent.[2225] Subject to one qualification, I will not address these contentions again.

1514 It is necessary to make one comment concerning GetSwift's Continuing Periods Contention in respect of the Fantastic Furniture Agreement Information.[2226] GetSwift submits that ASIC's general availability and materiality case are not sustainable in the light of the ASX Aware Query dated 25 January 2018 (see [1055]), the 9 February 2018 Market Update (see [1056]), the 19 February 2018 Market Update (see [1057]) and the media reporting at this time.[2227] While there are various references to Fantastic Furniture, the only relevant aspect in respect of the Fantastic Furniture Agreement Information concerns question 11 of the ASX Aware Query dated 25 January 2018, in which the ASX asked GetSwift, "[w]as the contract with Betta Home

[2223] GCS at [787].
[2224] GCS at [789]–[795].
[2225] GCS at [791].
[2226] GCS at [797].
[2227] GSW.0003.0004.0001; GSWTB0027; GSWTB0028; GSWTB0029; GSWTB0030; GSWTB0031; GSWTB0035; GSWTB0036; GSW.1001.0001.0099.

Living and Fantastic Furniture subject to any initial pilot testing trial period?", to which GetSwift responded:

> As noted in its ASX announcement of 23 August 2017, GSW entered into separate agreements with BETTA Home Living and Fantastic Furniture. The answers below relate to the Fantastic Furniture contract.
>
> **No.** Clause 4 provided that the term was 38 months, comprising a Trial Period and an Initial Term (of 36 months). Fees were only to be charged from the start of the Initial Period.[2228]

1515 The response is confused and confusing. On the one hand, a definitive "no" is given in response to the question as to whether Fantastic Furniture was subject to any initial pilot testing trial period. On the other, the 38-month term is said to include a two-month "Trial Period". The capitalisation of the words "Trial Period" may also muddy the waters as to whether these words indeed mean a trial period in the ordinary sense of the words (and in the sense used in the question), or whether, given the definite "no", a special meaning is to be attributed to the words. To my mind, this does not reveal with particularity any of the Fantastic Furniture Agreement Information. As such, I accept GetSwift, Mr Hunter and Mr Macdonald's admissions in the alternative that in the period from 23 August 2017 until the date of issue of this proceeding, GetSwift did not notify the ASX of the Fantastic Furniture Agreement Information.[2229]

1516 I am therefore satisfied that between 23 August 2017 and the date of issue of this proceeding, the Fantastic Furniture Agreement Information was material on a similar basis to that of the other "Agreement Information" discussed above. When read in the light of the Fantastic Furniture & Betta Homes Announcement (and the expectations engendered or reinforced by the announcement), the Fantastic Furniture Agreement Information would have conveyed to an investor that it was significantly less certain that the benefits under the Fantastic Furniture Agreement would be captured, particularly since the parties were in a trial period and it was not apparent whether the agreement would commence.

Conclusion

1517 Having established the necessary elements that make up ASIC's continuous disclosure case in respect of the Fantastic Furniture Agreement Information, I conclude that GetSwift

[2228] GSW.1001.0001.0054 at 0056 (emphasis added).
[2229] Defences at [120].

contravened s 674(2) of the *Corporations Act* by failing to disclose the Fantastic Furniture Agreement Information from 23 August 2017 until the date on which this proceeding was commenced.

Fantastic Furniture Termination Information

Existence

1518 ASIC contends that on 22 September, Fantastic Furniture terminated the Fantastic Furniture Agreement (**Fantastic Furniture Termination Information**).[2230]

1519 It is necessary to recall that on 22 September 2017, Mr Clothier received an email from Fantastic Furniture, stating (see [633]):

> Please accept this email as **formal notice that we will not proceed after the [trial] period** (1st of October) … However, we're kicking off some [trial] runs next week for the tracking purpose [*sic*] and to **give us a glimpse of what we can expect**, which then we can feed the experience to our marketing team.[2231]
>
> (Emphasis added).

1520 Mr Ozovek forwarded the email chain to Mr Macdonald the same day: see [636].

1521 Despite the email Mr Nguyen sent to Mr Clothier, each of the defendants denied that the Fantastic Furniture Termination Information existed.[2232] GetSwift, Mr Hunter and Mr Macdonald submits that, after receiving the email on 22 September 2017, GetSwift offered Fantastic Furniture "an extended trial period" for use of the software, and, as a result, GetSwift continued to engage with Fantastic Furniture following 22 September 2017.[2233]

1522 GetSwift, and to some extent, Mr Macdonald, point to four pieces of evidence to support their contention that the Fantastic Furniture Agreement had not been terminated:

(1) Mr Nguyen's email to Mr Clothier on 22 September 2017 which, notwithstanding it stated it was a formal notice of termination, noted "we're kicking off some [trial] runs next week … to give us a glimpse of what we can expect": see [633].

[2230] 4FASOC at [138].
[2231] GSW.1012.0001.0009 (emphasis added).
[2232] Defences at [138](d).
[2233] Defences at [138].

(2) Mr Clothier's reply to Mr Nguyen's email, which stated: "I was under the impression they were happy with the platform" and "I know that there will be ongoing testing and I will be working closely with your team to ensure that GetSwift adds value": see [634].

(3) A document of 20 October 2017, which prompted GetSwift to reopen its case, which stated that "the latest from Fantastic Furniture is that the project has been *put on hold*" because of what it said was a lack of coordination within Fantastic Furniture as to "responsibility and internal management" for the project (emphasis added): see [637].

(4) The fact that after 22 September 2017, testing was to take place and GetSwift was continuing to deal with people from the IT department of Fantastic Furniture: see [634] and [637].

1523 It is said this evidence demonstrates there were "misunderstandings" and "miscommunications" among various employees of Fantastic Furniture, and that Fantastic Furniture was still proposing to undertake trial runs.

1524 These contentions should not be accepted for the following reasons.

1525 *First*, a finding that Fantastic Furniture was terminating the Fantastic Furniture Agreement by Mr Nguyen's email is consistent with the documentary record and an ordinary understanding of the terms of his email. On 26 July 2017 (the day after the Fantastic Furniture Agreement was executed), Mr Jaafar had sent an email to Mr Clothier (copied to Mr Nguyen) which stated "please ensure prior to the commencement of the trial that it's clear to GetSwift that we will not proceed after the trial until we have all mutually agreed this software is the *way forward for us*" (emphasis added): see [608]. Mr Nguyen did just that, confirming on 22 September 2017 that Fantastic Furniture did not wish to proceed after the trial due to expire on 1 October 2017: see [633]. Although some trial runs were still going to be conducted prior to the expiry of the trial period, Mr Nguyen's email could not be clearer: "Please accept this email as formal notice that we will not proceed after the trial period (1st of October)." Evidently, the GetSwift Platform was *not* the "way forward" for Fantastic Furniture. Indeed, the intention behind Mr Jaafar's email, although not known to GetSwift, is confirmed by the fact that he had identified an alternative product called My Route Online: see [631].

1526 *Secondly*, any reliance on alleged "misunderstandings" and "miscommunications" of various employees of Fantastic Furniture can be put to one side by this point. By Mr Nguyen's email of 22 September 2017, GetSwift had been informed that the Fantastic Furniture Agreement would not proceed after the expiry of the trial period. The fact that Fantastic Furniture may

have remained interested in using the GetSwift Platform for the remainder of the trial period is simply a fact that was occurring within the context of the known termination of the Fantastic Furniture Agreement to take effect on 29 September 2017. As a result of the termination, the Fantastic Furniture Agreement did not move to the "initial term" of 36 months during which time fees were payable.

1527 *Thirdly*, the document which prompted GetSwift to reopen its case (see [637]), referring to how the Fantastic Furniture project had been "put on hold", is problematic for a number of reasons. This is because, among other things, it references Mr Jason Jack (General Manager of IT at Fantastic Furniture), who was "not aware of the termsheet [*sic*] signed" (see [637]) and was not involved in Fantastic Furniture's trial of the GetSwift platform in September 2017; there is no suggestion that Mr Jack himself advised GetSwift that the project was "put on hold"; and there is no indication in this email of when the alleged conversation between Mr Jack and Mr Clothier took place, including whether it took place before or after the termination took effect on 1 October 2017: see [638].

1528 Ultimately, it seems to me that while GetSwift may have harboured a hope that the relationship with Fantastic Furniture could be resurrected in some way (as is demonstrated by Mr Clothier's email (see [634])), that would have required a new agreement. No such agreement was offered or accepted: see [641]. As the documentary evidence further reveals, GetSwift's own records indicated that the last time Fantastic Furniture used GetSwift's Platform was, in fact, in September 2017: see [640]. In this sense, whatever Mr Clothier was thinking might be achievable did not translate into any relationship (contractual or otherwise) with Fantastic Furniture post-September 2017.

Awareness

1529 Mr Macdonald does not advance submissions as to his awareness of the Fantastic Furniture Termination Information. Nevertheless, the documentary evidence reveals that he received the email chain between Mr Clothier and Mr Nguyen of 22 September 2017, which stated that the Fantastic Furniture would not be proceeding after the trial period: see [636]. I am satisfied that Mr Macdonald was aware of the Fantastic Furniture Termination Information on and from 22 September 2017 and, by reason of that knowledge, so too was GetSwift.

General availability

1530 In the absence of GetSwift specifically addressing whether the Fantastic Furniture Termination Information was generally availability, I am satisfied, in the light of my discussions above (see [1143]), that it was not. It is unrealistic to assume that investors would be aware that the specific Fantastic Furniture Agreement had been terminated from any of GetSwift's public disclosures or from any process of deduction.

Materiality

1531 GetSwift's relies on the assertion that the 22 September 2017 email did not serve as termination of the Fantastic Furniture Agreement to submit that the Fantastic Furniture Termination Information was not material.[2234] This contention should be rejected given my finding that as of 22 September 2017, GetSwift knew that Fantastic Furniture had terminated its agreement with GetSwift by reason of Mr Nguyen's email: see [1518]–[1529].

1532 Further, GetSwift appears to rely upon its Continuing Periods Contention, including the various ASX announcements and media reports (see [1514]) to submit that the Fantastic Furniture Termination Information was not material. In the ASX Aware Query dated 25 January 2018, the ASX asked GetSwift, in question 13: "Has the contract with … Fantastic Furniture been terminated?" GetSwift responded: "Due to the circumstances of notification by Fantastic Furniture regarding the contract with them, the Company was left with the impression that activity may resume".[2235] In the 9 February 2018 Market Update, GetSwift clarified, in response to question 2, that "GetSwift promptly allowed the deferral of the agreement with Fantastic Furniture at the client's request and allowed future engagement to occur at client's convenience", further noting that Fantastic Furniture last used the GetSwift Platform in September 2017 and had not resumed using the platform, and that it "was not announced because the contract in isolation was not material and we expected re-engagement".[2236] Moreover, on 9 February 2018, it made the general comments that I have noted above at [1399].

[2234] GCS at [796].
[2235] GSW.1001.0001.0054 at 0056.
[2236] GSW.1001.0001.0099.

1533 I do not regard these statements to be of assistance to GetSwift. As noted above, Fantastic Furniture terminated its agreement with GetSwift. There was no basis for it to "expect re-engagement". Further, I reject any submission that GetSwift impliedly responded "yes" to whether the agreement had been terminated on 25 January 2018,[2237] and that this serves as a defence to ASIC's claim that the Fantastic Furniture Termination Information was not disclosed until the commencement of this proceeding. Stating that "activity may resume", when GetSwift knew it would not on 22 September 2017 (see [1529]), cannot be taken to be notifying the ASX that the Fantastic Furniture Agreement had been terminated. I should note that this is a common theme that runs through GetSwift's submissions: construing events and documents as if the stars have aligned and investors can telepathically "read between the lines". For these reasons, I am satisfied that the Fantastic Furniture Termination Information was not generally available and remained material, even in the light of the 2018 ASX Market Update Information.

1534 As noted, GetSwift also rely on various media reports at the time to contend the information became generally available and was no longer material from the date of their publication. Various AFR articles, for example, noted how Fantastic Furniture never used GetSwift's last-mile logistics software after an initial period, despite GetSwift's ASX announcements about a multi-year deal:

> In February 2017, GetSwift announced a contract with fruit delivery group The Fruit Box, which it described as an "exclusive three-year contract". But the deal ended just two months later after a trial period, a fact that wasn't revealed to shareholders until the Financial Review investigation was published.
>
> GetSwift conceded that it should have made it clear the deal included a trial period, but said it "did not consider including the qualification that Fruit Box could cease using the platform at any time because that is self-evident of a pay-as-you-go business model. Equally, because it is a pay-as-you-go model the termination right also wasn't considered material.[2238]

1535 One of the articles also quoted a spokesman for Steinhoff Australia and New Zealand, which owns Fantastic Furniture, stating that:

> GetSwift approached us in August last year. They were referred by one of our suppliers, Queensland All Purpose Transport, which does warehousing for Fantastic. They came and presented their software and we did a 30-day trial. But at the end of the

[2237] Defences at [142].
[2238] GSW.0003.0004.0001.

trial we said thanks, but no thanks.[2239]

1536 While these statements demonstrate there were issues with the Fantastic Furniture Agreement and indicate, quite convincingly, that Fantastic Furniture had given GetSwift the "flick", I am not satisfied that this makes the Fantastic Furniture Termination Information generally available. My reasoning for this is twofold. *First*, the AFR Article was published on 19 January 2018, a few weeks after which, GetSwift, in the 9 February 2018 Market Update, played down any idea of termination, noting, quite unbelievably, that "activity may resume".[2240] *Secondly*, the AFR article included a statement from an ASX spokesperson, stating, "[c]ompanies are obliged to inform the market about material and/or price sensitive developments. This includes updating the market if the circumstances of an earlier positive material announcement have changed". The implication from this: no ASX announcement; no material change. Hence, although the AFR article was painting an accurate picture of GetSwift, in all the circumstances, I do not accept that it rendered the Fantastic Furniture Termination Information generally available, and therefore no longer material.

1537 I am satisfied (despite there being no alternative admission like in relation to the other Enterprise Clients) that in the period from 22 September 2017 until the commencement of this proceeding, GetSwift did not notify the ASX of the Fantastic Furniture Termination Information.

1538 I conclude, in the context of Fantastic Furniture & Betta Homes Announcement, which would have engendered and reinforced investor expectations, that the Fantastic Furniture Termination Information was important contextual and qualifying information that would have informed investors that the Fantastic Furniture Agreement was no longer on foot.

Conclusion

1539 Having established the necessary elements of ASIC's continuous disclosure claim in respect of the Fantastic Furniture Termination Information, I conclude that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Fantastic Furniture Termination Information from 22 September 2017 until the date on which this proceeding was commenced.

[2239] GSW.0003.0004.0001.
[2240] GSW.1001.0001.0099.

H.3.9 *Betta Homes*

1540 ASIC's case in respect of Betta Homes concerns GetSwift, Mr Hunter, Mr Macdonald and Mr Eagle (in terms of the Betta Homes Agreement Information) and GetSwift, Mr Hunter and Mr Macdonald (in terms of the Betta Homes No Financial Benefit Information).

Betta Homes Agreement

1541 On or about 21 August 2017, GetSwift entered into the Betta Homes Agreement. The material terms included that: (a) there was a trial period of two months; (b) the trial period would not commence until the parties had reasonably agreed that GetSwift's proprietary software platform was operating effectively and was available for immediate use by Betta Homes; and (c) if Betta Homes did not give notice in writing electing to continue the Betta Homes Agreement during the trial period, the 18 month term of the Betta Homes Agreement would not commence and it was not obliged to use GetSwift exclusively for its last-mile delivery services: see [664]–[665].

Fantastic Furniture & Betta Homes Announcement

1542 I have already made findings above (at [1507]–[1508]) concerning the knowledge of each of Mr Hunter, Mr Macdonald and Mr Eagle in respect of the Fantastic Furniture & Betta Homes Announcement made on 23 August 2017.

1543 One issue I have not addressed is Mr Eagle's submission regarding his awareness of the Fantastic Furniture & Betta Homes Announcement (given no contravention is alleged against him in respect of Fantastic Furniture). An issue arises due to the specificity of ASIC's pleadings. ASIC pleads that, on and from 10:20am on 23 August 2017 until the date of issue of the proceeding, Mr Eagle knew that GetSwift had submitted the Fantastic Furniture & Betta Homes Announcement to the ASX.[2241] Further, ASIC submits that Mr Eagle had knowledge of the Betta Homes Agreement and the Betta Homes Agreement Information, and was involved in the communications relating to the drafting, finalisation and authorisation of the Fantastic Furniture & Betta Homes Announcement.[2242]

[2241] 4FASOC at [331].
[2242] ACS at [1655(c)].

1544 Mr Eagle submits that, however, that while the Fantastic Furniture & Betta Homes Announcement was being drafted and finalised, he was on a flight back to Sydney, and therefore did not see the final version before it was released.[2243] Mr Eagle notes that, by reason of the email Mr Eagle sent on 22 August 2017, Messrs Hunter and Macdonald and Ms Gordon were aware that Mr Eagle was going to be on a plane, and that he would be unable to access his emails to review the announcement: see [666].

1545 As the following timeline of events show, it is difficult to infer that Mr Eagle had time to review the Fantastic Furniture & Betta Homes Announcement before 10:20am on 23 August 2017:

(1) At 3:43am on 22 August 2017, Mr Eagle emailed Messrs Hunter and Macdonald and Ms Gordon that he was "[j]ust getting on a plane back to Sydney, arrive Wed [*sic*] morning": see [666].

(2) At 1:25am on 23 August 2017, Mr Mison sent an email to Mr Hunter, Mr Macdonald, Ms Gordon and Mr Eagle attaching a draft of the Fantastic Furniture & Betta Homes Announcement: see [619].

(3) At 6:30am on 23 August 2017, Mr Eagle's flight from Amsterdam, with a stopover in Abu Dhabi, arrived in Sydney: see [661].

(4) At 8:49am, Mr Mison sent an email to Messrs Macdonald, Hunter and Eagle, and Ms Gordon attaching the final draft of the announcement concerning GSW's entry into the Fantastic Furniture and Betta Homes Agreements. In the email, Mr Mison stated "please find attached revised ASX release that will go out this morning": see [619].

(5) At 10:20am on 23 August 2017, the ASX released the Fantastic Furniture & Betta Homes Announcement to the market: see [620].

(6) At 10:44am on 23 August 2017, Mr Mison sent an email to Messrs Macdonald, Hunter, Eagle and Ms Gordon, forwarding the confirmation of release from the ASX: see [621].

1546 Based on the tight timeline, and the fact that Mr Eagle had just got off an international flight, I am satisfied that Mr Eagle knew that GetSwift had submitted the Fantastic Furniture & Betta Homes Announcement to the ASX, but I am not at all convinced he read it in any detail. Indeed, the established practice by this time was that Mr Eagle's input as to ASX announcements was

[2243] ECS at [251]–[257].

regarded by Mr Hunter and Mr Macdonald as really an optional extra. I will return to this issue when determining Mr Eagle's accessorial liability below: see [1918].

Betta Homes Agreement Information

Existence

1547 ASIC alleges, and the defendants accept (apart from Mr Eagle),[2244] that at the time of the Fantastic Furniture & Betta Homes Announcement on 23 August 2017, the following factual circumstances existed: (a) the Betta Homes Agreement contained a trial period of two months; (b) the Betta Homes Agreement provided that the trial period would not commence until "the parties reasonably agree that [GetSwift's] proprietary software platform is operating effectively and available for immediate use by [Betta Homes]"; (c) the parties had not yet "reasonably agreed that GetSwift's proprietary software platform is operating effectively"; and (d) if Betta Homes did not give notice in writing electing to continue the Betta Homes Agreement during the trial period, the 18 month term of the Betta Homes Agreement would not commence and it was not obliged to use GetSwift exclusively for its last-mile delivery services (collectively, the **Betta Homes Agreement Information**). It is difficult to see why Mr Eagle disputes this point, and no submissions are advanced to the contrary.

Awareness

1548 GetSwift admitted that it was aware of the Betta Homes Agreement Information.[2245] As to Mr Hunter and Mr Macdonald, although no specific submissions were advanced, the documentary evidence reveals that both of them were responsible for negotiating the Betta Homes Agreement and that they both received the final version of the Term Sheet: see [644]–[668]. Accordingly, I am satisfied that both Mr Hunter and Mr Macdonald were aware of each of the matters forming part of the Betta Homes Agreement Information.

1549 Mr Eagle contends that he was not aware of factual circumstance (c), namely that the parties had not yet reasonably agreed that GetSwift's proprietary software platform was operating effectively. The premise of this submission appears to be twofold: *first*, Mr Eagle had no

[2244] Defences at [134].
[2245] GCS at [863].

involvement in the underlying commercial relationship between GetSwift and Betta Homes, and that as a non-executive director, he had no responsibility over such matters;[2246] and *secondly*, there is no evidence that Mr Eagle had knowledge that GetSwift and Betta Homes were in a trial period.[2247]

1550 These submissions should be rejected. While Mr Eagle may not have had a significant involvement in the underlying commercial relationship between GetSwift and Betta Homes, I am satisfied he was aware that it had not yet been agreed that GetSwift's proprietary software platform was operating effectively. On 30 July 2017, Mr Eagle received an email from Mr Macdonald attaching the Betta Homes Agreement (at [656]), which contained the clause stating that the trial period would not commence until the parties "reasonably agreed that GetSwift's proprietary software was operating effectively". In that email, Mr Eagle was specifically drawn to this clause because Mr Macdonald stated "the trial period wording is a little subjective". While Mr Eagle's reply is redacted, it can be inferred that at this time, the parties had not yet agreed that the software was operating effectively (and that Mr Eagle was aware of this), given that if it was, the clause making the commencement of the trial period conditional would not have been of concern.[2248] This view is fortified by the fact that during negotiations with Betta Homes, Mr Eagle was sent various drafts of the Betta Homes Agreement for his input and review (noting that his comments have been redacted): see [655]. In any event, on the evidence as it stands, I am satisfied that by reason of his involvement in the negotiation and drafting of the Betta Homes Agreement (see [655]–[660]) it is more likely than not that Mr Eagle was aware of the remaining factual circumstances.

General availability

1551 The arguments advanced in respect of the general availability of the Betta Homes Agreement Information mirror those advanced in respect of the Fantastic Furniture Agreement Information: see [1512].[2249] For the same reasons, I am satisfied that the Betta Homes Agreement Information was also not generally available.

[2246] ECS at [277].
[2247] ECS at [277].
[2248] ASIC Reply at [337]–[338].
[2249] GCS at [864]–[865].

Materiality

1552 GetSwift's arguments as to why the Betta Homes Agreement Information was not material largely mirror its Absence of Quantifiable Benefits Contention, Continuing Periods Contention and Share Price Contention, and have been addressed above in respect of the Fantastic Furniture Agreement Information: see [1513].[2250] I will not address these contentions again. There are, however, two additional submissions that merit specific attention.

1553 The *first* concerns its submissions concerning factual circumstance (b) and (c),[2251] which relate to the need for GetSwift to integrate with Shippit: see [643], [652] and [668]. While GetSwift admit that both of these circumstances existed and that it was aware of them,[2252] it argues that as at 23 August 2017, there was no reason to believe that integration with Shippit would not occur, and that this fact undermines ASIC's case. Reliance is placed on Ms Smith's evidence that the two systems were capable of being integrated, that "the ball was in Shippit's court in terms of the integration", and that it was expected that GetSwift and Shippit would cooperate to ensure integration of the software (see [668]), along with the fact that it was not expected that Shippit would refuse to integrate since it had recommended GetSwift itself. Finally, GetSwift submits that it would have been "obvious" that any agreement it entered into would require integration and that this would occur after a contractual relationship had been entered into by the parties.[2253]

1554 The *second* submission is a manifestation of the Continuing Periods Contention, and the assertion that in the light of the 2018 ASX Market Update Information and media reporting at the time, the allegations of general availability and materiality are not sustainable for the entire period alleged by ASIC.[2254]

1555 As to its *first* contention, it is not to the point that GetSwift had no reason to believe that integration could not or would not occur, or even that it was "obvious" that integration would occur after the signing of the agreement (which inevitably did not occur). What is to the point is that, as at 23 August 2017, integration with Shippit had not yet occurred: see [684]. I regard

[2250] GCS at [866]–[872], and [875].
[2251] GCS at [874].
[2252] Defences at [134].
[2253] GCS at [874].
[2254] GCS at [877].

that information, in and of itself, to be important contextual and qualifying information in the light of the information in the Fantastic Furniture & Betta Homes Announcement, which failed to reveal how the commencement of the Betta Homes Agreement was actually conditional on integration with a third party. Since integration with Shippit had not yet occurred as at the date of the Betta Homes & Fantastic Furniture Announcement, I am satisfied that factual circumstances (b) and (c) of the Betta Homes Agreement Information sufficiently qualified the contents of the Fantastic Furniture & Betta Homes Announcement (and the expectations engendered and reinforced by that announcement) because it would have conveyed to investors that there was less certainty as to whether the benefits under the Betta Homes Agreement would be captured, particularly as it was not apparent to investors whether, or when, integration with Shippit would commence.

1556 As to GetSwift's *second* contention, while there are scattered references to Betta Homes in the 2018 ASX Market Update Information and the media reporting that GetSwift draw upon, these do not relate to the Betta Homes Agreement Information. As such, I do not see how these documents can undermine ASIC's general availability and materiality case in respect of the Betta Homes Agreement Information.[2255] Further, I do not regard them to be a sufficient defence to ASIC's claim that the Betta Homes Termination Information was not disclosed until the commencement of these proceedings.[2256] As such, I accept GetSwift, Mr Hunter and Mr Macdonald's admissions in the alternative that in the period from 23 August 2017 until the date of issue of this proceeding, GetSwift did not notify the ASX of the Betta Homes Agreement Information.[2257]

1557 For completeness, it is important to say that I am satisfied that the Betta Homes Agreement Information was material for the same reasons I have expressed in relation to the Fantastic Furniture Agreement Information: see [1516].

[2255] GCS at [877].
[2256] Defences at [136].
[2257] Defences at [136].

Conclusion

1558 For the above reasons, I conclude that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Betta Homes Agreement Information from 23 August 2017 until the date on which this proceeding was commenced.

Betta Homes No Financial Benefit Information

Existence

1559 It was common ground that, from 24 January 2018, the following further factual circumstances existed: (a) Betta Homes and GetSwift had not yet agreed that GetSwift's proprietary software platform was operating effectively; (b) Betta Homes had not completed any trial of the GetSwift Platform; and (c) Betta Homes had not made any deliveries using the GetSwift Platform (collectively, the **Betta Homes No Financial Benefit Information**).[2258]

Awareness

1560 The documentary record reveals that Mr Macdonald was aware of the Betta Homes No Financial Benefit Information. Indeed, by reason of email chains in July 2017 concerning the term sheet, Mr Macdonald knew that Betta Homes required GetSwift to facilitate integration with Shippit in order for Betta Homes to trial the GetSwift Platform: see [652]. Moreover, on 17 August 2017, Mr Macdonald sent an email to Mr On (copied to Mr Hunter) in which he noted (see [662]):

> I see we are going to be integrating shortly with Betta all things pending on the legals [*sic*] side. **Wanted to touch base on a couple of things and bring our Chairman (Bane Hunter) in on the conversation**. We think that there might be some synergies of opportunity by approaching things potentially from a joint perspective so keen to have that discussion if you are around next week sometime.[2259]

1561 Similarly, on 22 August 2017, Ms Smith emailed Mr Macdonald (copied to Mr Hunter), nothing "she was happy to organise a meeting with the guys at Shippit to get the integration started" (emphasis added): see [667]. Thereafter, between August 2017 and January 2018, Mr Macdonald engaged in telephone calls, and responded to (and was copied into) a plethora of email communication concerning the status of Shippit's integration with the GetSwift platform

[2258] Defences at [139].
[2259] GSWASIC00013409 (emphasis added).

(see [672]–[681]), including, notably, an email which said that "they've delayed the go live until next year because of xmas period": see [678]. As of 23 January 2018, this integration had not been completed: see [684]. Given Mr Macdonald's involvement in these discussions, the compelling inference is that he would have been aware by 23 January 2018 that factual circumstance (a), and by natural extension, factual circumstances (b) and (c), existed.

1562 In respect of Mr Hunter, the evidence on this point is complicated by the fact that, following this email sent on 22 August 2017, there are no emails that reveal that Mr Hunter had any further involvement with Betta Homes. Given his typically dominant and forceful management style, his absence from these email chains is noteworthy. However, in the light of his apparent absence from 22 August 2017 to 24 January 2018, it would be artificial to conclude that he too would have been aware of each of the factual circumstances in the Betta Homes No Financial Benefit Information. Accordingly, I am not satisfied that as at 24 January 2018, Mr Hunter was aware of the Betta Homes No Financial Benefit Information. I note that it is unrealistic to think that Mr Hunter did not become aware of Betta Homes No Financial Benefit Information until the date on which this proceeding was commenced, but to pinpoint a date on the evidence before me would be nothing more than speculation.

1563 By reason of the knowledge of Mr Macdonald, I am satisfied that as at 24 January 2018, GetSwift was aware of the Betta Homes No Financial Benefit Information.

General availability

1564 In the absence of GetSwift specifically addressing whether the Betta Homes No Financial Benefit Information was generally available, I am satisfied it was not generally available on the basis of my discussion above (see [1143]). It would be unrealistic to assume that investors could deduce, from the Prospectus, financial disclosures or otherwise, those specific parts of the Betta Homes No Financial Benefit Information.

Materiality

1565 GetSwift's primary contention is that the Betta Homes No Financial Benefit Information was not material given there was nothing to suggest to GetSwift that integration was still not taking place with Shippit as at 24 January 2018 (a task Shippit agreed to lead). In support, GetSwift contends that there was no reason to believe that Shippit was not still undertaking the necessary

steps it was supposed to be undertaking, and there was nothing about the dealings that would raise any concern about GetSwift's Platform not operating effectively.[2260]

1566 These submissions are beside the point. The reality is that on 24 January 2018, integration with Shippit had not yet occurred, there had been no contact between GetSwift and Betta Homes for over a month, and all communications between the parties had ceased: see [684]. These circumstances seem to me to contradict directly GetSwift's submissions that there was nothing about the dealings that would raise any concern. Therefore, in circumstances where Betta Homes had not agreed that the GetSwift Platform was operating effectively, the trial period had not yet been completed, and no deliveries had been made, the Betta Homes No Financial Benefit Information materially qualified the information released to the market from the Fantastic Furniture & Betta Homes Announcement and the expectations engendered and reinforced by that announcement.

1567 For completeness, to the extent that GetSwift refers to factual circumstance (d) of the Betta Homes No Financial Benefit Information (that is, Betta Homes and GetSwift had ceased engaging with each other), that element was abandoned by ASIC. GetSwift's submissions in that regard – which appear to draw upon the fact that Shippit, without notifying GetSwift, had informed Ms Smith that it had unilaterally decided it was not going to pursue integration with Shippit (in any case, Ms Smith's evidence in this regard was subject to a s 136 limitation and is not evidence of the fact) – cannot be relevant to any defence to the continuous disclosure allegations.[2261]

1568 To the extent that GetSwift relies upon its Continuing Periods Contention, for the reasons that I have already provided, I am not satisfied that the Betta Homes No Financial Benefit Information was disclosed in the 2018 ASX Market Update Information, nor do any of these announcements affect ASIC's general availability and materiality case.[2262] To this end, I accept GetSwift, Mr Hunter and Mr Macdonald admissions, in the alternative, that GetSwift did not

[2260] GSW at [876].
[2261] ASIC Reply at [333].
[2262] GCS at [877].

notify the ASX of the Betta Homes Agreement No Financial benefit Information from 24 January 2018 until the date of issue of this proceeding.[2263]

Conclusion

1569 I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Betta Homes No Financial Benefit Information from 24 January 2018 until the date on which this proceeding was commenced.

H.3.10 *Bareburger Group LLC*

1570 ASIC's case in respect of Bareburger concerns GetSwift, Mr Hunter and Mr Macdonald.

Bareburger Agreement

1571 On 17 August 2017, Bareburger signed the Bareburger Agreement, the material terms of which included that: (a) Bareburger exclusively engaged GetSwift to provide the following services: use of GetSwift's proprietary software platform to provide Bareburger with logistics management, tracking, dispatch, route and reporting of delivery operations, including provision of SMS alerts, related reports and system data dumps; and consultancy advice in relation to those services in a reasonable number of meetings as Bareburger reasonably requests; (b) there was a trial period, ending on 1 October 2017; (c) Bareburger was permitted to terminate the Bareburger Agreement, at any time in the period up to seven days prior to the expiration of the trial period, by giving notice in writing; and (d) if such notice was given, the three-year term of the Bareburger Agreement would not commence and Bareburger would not be obliged to use GetSwift exclusively for its last-mile delivery services: see [695].

1572 Each of the relevant defendants admitted that on 19 August 2017, Bareburger and GetSwift varied the Bareburger Agreement to adjust the expiry date of the trial period from 1 August 2017 to 1 October 2017.[2264]

[2263] Defences at [142].
[2264] 4FASOC at [163]; Defences at [162]–[163].

Bareburger Announcement

1573 Each of the relevant defendants also admitted that on 30 August 2017, GetSwift submitted the Bareburger Announcement to the ASX, entitled "Bareburger signs commercial agreement with GetSwift", which stated that GetSwift had signed an "exclusive commercial multi-year agreement" with Bareburger,[2265] and was marked "price sensitive" in accordance with the instructions of Mr Macdonald: see [706].

1574 Unlike Mr Hunter,[2266] Mr Macdonald did not make any admissions as to his involvement in the drafting, transmission or authorisation of the Bareburger Announcement. Yet, the documentary evidence establishes that Mr Macdonald received various draft versions of the Bareburger Announcement and sent the final version of the announcement to Mr Banson (copied to Mr Hunter) instructing him to release the announcement to the ASX: see [702]–[706]. Further, Mr Banson sent an email to each of the directors confirming that the Bareburger Announcement had been released by the ASX: see [708]. Accordingly, I am satisfied that both Messrs Hunter and Macdonald had knowledge of the content of the Bareburger Announcement that was submitted to the ASX.

Bareburger Agreement Information

Existence

1575 ASIC alleges, and the relevant defendants accept, that at the time of the Bareburger Announcement on 30 August 2017, the following factual circumstances existed: (a) the Bareburger Agreement, as varied, contained a trial period ending on 1 October 2017; (b) the parties were still within the trial period; (c) Bareburger was permitted, at any time in the period up to seven days prior to the expiration of the trial period, to terminate the Bareburger Agreement by giving notice in writing; and (d) if Bareburger terminated the Bareburger Agreement at any time in the period up to seven days prior to the expiration of the trial period, the three-year term of the Bareburger Agreement would not commence, and it was not obliged to use GetSwift exclusively for its last-mile delivery services (collectively, the **Bareburger Agreement Information**).[2267]

[2265] Defences at [164].
[2266] Defence at [347(i)].
[2267] Defences at [166].

Awareness

1576 The documentary record reveals that the Bareburger Agreement, and the amendments to it, were negotiated by Mr Macdonald, predominantly by emails which were copied to Mr Hunter: see [686]–[691]. This culminated with Mr Macdonald sending an email to Mr Zarmati on 19 August 2017 (copied to Mr Hunter) which annexed a "Term Sheet" to which Bareburger and GetSwift were parties: see [692]–[695]. Based on this, I am satisfied that both Mr Hunter and Mr Macdonald were aware of the Bareburger Agreement Information from 30 August 2017, and by reason of this knowledge, so too was GetSwift.

General availability

1577 Other than contending that factual circumstances (c) and (d) could be deduced from the Prospectus, which I reject for the reasons as outlined above (at [1117]–[1141]), GetSwift did not dispute that the Bareburger Agreement Information was generally available.[2268] For completeness, I note that I find factual circumstances (a) and (b) of the Bareburger Agreement Information were not generally available for the reasons above (see [1117]–[1141]), given that investors could not have discerned that the Bareburger Agreement, as varied, contained a trial period, which the parties were still within.

Materiality

1578 GetSwift formulaically repeats its previous materiality arguments, including its Absence of Quantifiable Benefits Contention and Share Price Contention.[2269] Specifically, GetSwift highlights that there was only a two per cent increase in its share price on the day of the Bareburger Announcement,[2270] which it says is "unremarkable" given the Bareburger Announcement did not include any statement regarding the expected benefits to GetSwift from the Bareburger Agreement.[2271] There is no need for me to address these contentions yet again, other than to say that they should not be accepted.

[2268] GCS at [733].
[2269] GCS at [914]–[920].
[2270] GSW.0003.0005.0325 at 3.
[2271] GCS at [916].

1579 The only contention I should touch upon is GetSwift's Continuing Periods Contention. It is untenable, it is said, that GetSwift remained obliged to disclose the alleged information until the date of proceeding, given that the 9 February 2018 Market Update (see [1056]) and 19 February 2018 Market Update (see [1057]) expressly discussed the existence of trial periods.[2272] While there were general references to trial periods in these announcements, including the statements that I canvassed above (at [1399]), there is no reference to Bareburger. To this end, for similar reasons at [1399], I find that GetSwift remained obliged to disclose the omitted Bareburger Agreement Information during the time period which ASIC's case extends. As such, I accept GetSwift, Mr Hunter and Mr Macdonald's admissions in the alternative that in the period from 30 August 2017 until the date of issue of this proceeding, GetSwift did not notify the ASX of the Bareburger Agreement Information.[2273]

1580 Ultimately, I should say that for the same reasons that I have expressed in relation to the other Enterprise Clients in respect of whether the relevant Agreement Information is material, such as in respect of Fruit Box (see [1291]), APT (see [1417]), CITO (see [1487]), and Hungry Harvest (see [1497]), I am satisfied that the Bareburger Agreement Information was material.

Conclusion

1581 Having satisfied myself that the four continuous disclosure elements have been established, I conclude that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Bareburger Agreement Information from 30 August 2017 until the commencement of this proceeding.

H.3.11 *NA Williams*

1582 ASIC's case in respect of NA Williams concerns each of GetSwift, Mr Hunter, Mr Macdonald and Mr Eagle.

[2272] GCS at [919].
[2273] Defences at [168].

NAW Agreement and NAW Agreement Execution Information

Existence

1583 It is common ground (apart from Mr Eagle) that on or about 18 August 2017, GetSwift entered into the NAW Agreement: see [746].[2274] Under the NAW Agreement, NA Williams was to provide "sales and marketing services" to GetSwift in the North American Automotive Aftermarket sector (**NAW Agreement Execution Information**): see [747].

1584 GetSwift admitted that the NAW Agreement Execution Information existed.[2275]

Awareness

1585 GetSwift also admitted that it was aware of the NAW Agreement Execution Information.[2276] While Mr Hunter and Mr Macdonald did not advance submissions as to their awareness, the evidence reveals that they both attended the meeting with NA Williams on 27 July 2017: see [724]. Moreover, Mr Macdonald had extensive involvement in the negotiation and drafting of the NAW Agreement (see [741]–[745]), including signing the NAW Agreement on behalf of GetSwift: see [746]. Mr Hunter was also copied into a number of emails containing drafts of the proposed agreement, and even responded with comments in relation to the time for payment: see [743]–[745].

1586 Similarly, Mr Eagle was sent, and provided comments on, various draft versions of the NAW Agreement. For example, on 17 August 2017, Mr Eagle was forwarded Mr McCollum's email that attached a draft version of the agreement and stated (at [743]):

> We're okay with everything except for a couple of points and a question or two. I've made a few remarks on the agreement. Please review and let me know your thoughts and then we'll get on to the next steps of getting started. I'm in the office tomorrow if that's a good time to connect.[2277]

1587 Notably, the details of the NAW Agreement Execution Information appeared in the attached draft unmarked. On 17 and 18 August, Mr Eagle provided his comments on the proposed NAW agreement and was told by Mr Macdonald that his comments were incorporated into the draft

[2274] Defences at [179].
[2275] GCS at [979].
[2276] GCS at [979].
[2277] GSWASIC00063826 attaching GSWASIC00057046.

agreement: see [743]. While I accept Mr Eagle may not have seen the NAW Agreement at the time of execution, and was not provided with a signed copy of the NAW Agreement or made aware of the finally agreed terms until at least 5 September 2017 (see [775]), this is not to the point.[2278] Mr Eagle was involved in drafting the agreement right up until its execution on 18 August 2017, at which time the details of the NAW Agreement Execution Information do not appear on the evidence to have been contested. Without evidence to the contrary, I am satisfied that he would have been aware of the NAW Agreement Execution Information. Accordingly, I am satisfied that each of Mr Hunter, Mr Macdonald and Mr Eagle were aware of the NAW Agreement Execution Information on 18 August 2017.

1588 GetSwift, Mr Hunter and Mr Macdonald admitted that between 18 August 2017 and 12 September 2017, GetSwift did not notify the ASX of the NAW Agreement Execution Information.[2279]

General availability

1589 GetSwift admitted that during the relevant period, the NAW Agreement Execution Information was not generally available.[2280]

Materiality

1590 GetSwift contends that ASIC's pleaded case concerning the NAW Agreement Execution Information comprises the "simple and singular fact" that GetSwift entered into an agreement with NA Williams and claims that there is insufficient evidence to support a conclusion that the "bare" NAW Agreement Execution Information in itself was material.[2281] In support of this contention, GetSwift highlights how the First and Second NAW Announcements (which were subsequently released) contained significantly more information about the NAW Agreement beyond the simple fact that GetSwift had entered into an agreement with NA Williams. However, it is said that even when the First and Second NAW Announcements were released, they did not elicit a "long lasting" effect on the share price (although it does accept that the announcements had an "immediate" effect on the share price). For instance, the day before the

[2278] ECS at [290].
[2279] Defences at [181].
[2280] GCS at [979].
[2281] GCS at [980]–[981].

announcements, the GetSwift share price was $1.74. The day after, the share price closed at $2.06 (an 18.4 per cent increase). Five days later, the share price closed at $1.77, which was almost the same as the pre-announcement share price.[2282] By GetSwift's reasoning, the mere announcement of the NAW Agreement Execution Information (which was absent the additional information included in the NAW Announcements) could not have been material if the release of further information through the First and Second NAW Announcements (which contained more significant information) did not result in a sustained impact on the share price. This proposition need only be stated to be rejected. As anyone who has ever seen an event study would understand, the reasons for fluctuation in the share price were not explored in sufficient detail in the evidence to allow definitive conclusions to be drawn.

1591 Moreover, there are further issues with these submissions. *First*, GetSwift fails to consider and address rule 3.1 of the Listing Rules which, as noted above (see [1073]), identifies that entry into a material agreement is a type of information that a reasonable person would expect to have a material effect on the price or value of the entity's securities. The NAW Agreement was a significant development for GetSwift, given NA Williams was to become an exclusive representative in the sales and marketing of GetSwift's platform, thereby opening up a new "vertical" market in the "North American Automotive Aftermarket channel". Indeed, investors would have been able to expect that this new "channel" would deliver substantial benefits to GetSwift, including by providing entry into a market through a well-positioned local partner. It would also have confirmed the quality and performance of GetSwift's platform and the likelihood of GetSwift winning additional contracts (either through the new "channel" or by association with NA Williams). *Secondly*, and in any event, to the extent that the contention is a repetition of GetSwift's Share Price Contention, it should be rejected for the reasons discussed above. As I have said numerous times, share price fluctuation is not determinative of the question of materiality.

1592 Finally, while I do not place much reliance on these factors, the materiality of the NAW Agreement Execution Information should be considered in the light of Mr Hunter's own comments that the "scale [of the partnership] is pretty big" (see [772]) and the fact that GetSwift regarded the NAW Agreement Execution Information as a matter that required disclosure in a

[2282] GSW.0003.0005.0325 at 4.

"price sensitive" announcement. Further, given that Mr Hunter knew the "timely planning and delivery of key commercial accounts is paramount" and that there would be a spotlight on GetSwift during its capital raises, it may be inferred that the announcement was delayed to maximise the impact of the announcement on the share price in advance of the Second Placement (given the proximity of the NAW Agreement Execution Information to the Second Placement): see [1817]–[1818] and [2005].[2283] While I place little weight on these points, they are consistent with the conclusions of the objective analysis above: see *James Hardie* (at 161 [349] and 183 [454] per Spigelman CJ, Beazley and Giles JJA).

Conclusion

1593 I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the NAW Agreement Execution Information from 18 August 2017 until 12 September 2017.

First NAW Announcement

1594 Each of the defendants admits that on 12 September 2017, GetSwift submitted to the First NAW Announcement to the ASX, entitled "GetSwift partners with NA Williams in 1bn+ Transaction Per Annum Opportunity in the Automotive Sector".[2284] Although GetSwift entreated the ASX to release the First NAW Announcement as "price sensitive", the ASX did not do so: see [778].[2285] It was also common ground that the First NAW Announcement stated: (a) GetSwift had signed an exclusive commercial five year agreement with N.A. Williams, the leading representative group for the North American Automotive Sector; (b) N.A. Williams and GetSwift estimate that this agreement will potentially yield in excess of 1.15 billion (1,150,000,000) transactions a year when fully implemented (**NAW Transaction Projection**); and (c) GetSwift estimates that the fulfilment of this vertical will take at least 15-19 months due to the project scope, size and complexity of the channel partners.[2286]

1595 The documentary record establishes that Mr Hunter, Mr Macdonald and Mr Eagle received email confirmation from Mr Banson on 12 September that the announcement had been lodged

[2283] ACS at [1528]–[1529].
[2284] Defences at [183].
[2285] Defences at [184].
[2286] Defences at [183].

with the ASX: see [778]. I am therefore satisfied that each of the directors was aware that GetSwift had submitted the First NAW Announcement to the ASX.

1596 It is also clear to me that Mr Hunter, Mr Macdonald and Mr Eagle were aware of the contents of the First NAW Announcement. Mr Hunter admitted that he contributed to its drafting.[2287] Mr Macdonald admitted that he directed and authorised the transmission of the announcement to the ASX.[2288] Similarly, Mr Macdonald and Mr Eagle received an email from Mr Hunter on 5 September 2017, which attached a draft of the NA Williams Announcement, and where Mr Hunter stated that the information was "highly sensitive and subject to ASX disclosure rules", instructed the recipients of the email not to discuss the information with anyone and requested comments in relation to "material errors": see [775]. While Mr Eagle contends that "there was no instruction [to him] to review the announcement in his capacity as a lawyer",[2289] I disagree to the extent that this contention is directed to the fact that he did not review it. Although he may not have been invited by Mr Hunter to contribute to the substantive drafting of the announcement,[2290] Mr Eagle was the *de facto* General Counsel of GetSwift and was expressly asked to provide his comments as to any "material errors". I am therefore satisfied that each of the directors was aware of the contents of the First NAW Announcement.

Second NAW Announcement

1597 As noted above, there was a degree of unhappiness that the ASX had not released the First NAW Announcement as price sensitive (see [779]), and the same day, on 12 September 2017, GetSwift submitted to the ASX a second announcement entitled "GetSwift Partners with NA Williams in 1bn+ Transaction Per Annum Opportunity in the Automotive Sector" (**Second NAW Announcement**). At the instruction of Mr Hunter, through Mr Banson (to whom he dictated "Resubmit the right line ASAP and mark it as price sensitive": see [782]), the ASX released the announcement as "price sensitive": see [792].

[2287] Hunter Defence at [347(j)].
[2288] Macdonald Defence at [271(vi)].
[2289] ECS at [290].
[2290] ECS at [290].

1598 It is common ground that the Second NAW Announcement mirrored the first NAW Announcement, save that it included the following additional statement (which I will term the **NAW Revenue Projection**):

> The signing of the 5 year agreement is expected to significantly increase the company's reoccurring revenues by more than $138,000,000 per year once fully captured.[2291]

1599 Mr Hunter admitted that he contributed to drafting the Second NAW Announcement.[2292] This is supported by the documentary record, which reveals that he sent an email to Mr Macdonald, Mr Eagle and Mr Banson on 12 September 2017 stating (see [783]):

> Agree use this
>
> 'The signing the 5 year agreement is expected to significantly increase the company's reoccurring revenues by more than $150,000,000 per year once fully captured.

1600 Relatively contemporaneously, Mr Hunter sent an email to Mr Sam Kiki of Aesir Capital (copied to Mr Macdonald and Mr Eagle) which stated, "[a]ctually make that more than $138,000,000 per year (conversion rates etc)": see [784]. This mirrored another email that Mr Hunter sent to Mr Banson (copied to Mr Eagle and Mr Macdonald) in relation to a draft of the Second NAW Announcement, which stated "change it to "more than 138m" instead of 150 and good to go": see [788]. Mr Banson responded to each of the directors saying, "[a]mended. Awaiting approval from Joel and Jamila?": see [788], to which Mr Macdonald replied "yes lets get it out please": see [788]. As noted above, Mr Eagle also replied, stating, "[c]onfirmed and being released now. B": see [789]. Accordingly, I am satisfied that each of the directors knew GetSwift had submitted the Second NAW Announcement to the ASX and were aware of its contents.

1601 For completeness, I note that Mr Macdonald says that he did not provide any input into the drafting of the Second NAW Announcement,[2293] and that it was Mr Hunter who was responsible for the projection of $138,000,000.[2294] But this is beside the point. Irrespective of whether Mr Macdonald formulated the NAW Revenue Projection, Mr Macdonald approved the announcement by stating "yes lets [*sic*] get it out": see [788].

[2291] Defences at [186].
[2292] Hunter Defence at [347(k)].
[2293] MCS at [462].
[2294] MCS at [469].

NAW Projection Information

Existence

1602 When the First and Second NAW Announcements were released to the market on 12 September 2017, ASIC contended that the following circumstances existed:

(a) NA Williams was a representative body for manufacturers, retailers and distributors operating in the automotive aftermarket industry (**NAW Clients**) and could not compel any NAW Client to enter into any agreements, including with GetSwift;

(b) NA Williams had no involvement in the delivery operations of NAW Clients;

(c) NA Williams did not know what delivery systems, if any, NAW Clients were using;

(d) NA Williams did not know whether NAW Clients would be interested in the GetSwift Platform;

(e) NA Williams had not disclosed to GetSwift any independent information data or research to assist in quantifying the annual numbers of deliveries for either the entire automotive aftermarket or channel customers;

(f) the NAW Transaction Projection was based on a high level estimate of the total addressable market for the GetSwift Platform in the North American automotive aftermarket industry made by NA Williams together with GetSwift;

(g) GetSwift did not, alternatively did not adequately, discount the NAW Transaction Projection to take into account competition, regulatory constraints, uptake by NAW Clients or other barriers to servicing the total addressable market;

(h) GetSwift, did not, alternatively did not adequately, conduct independent research to ascertain the competition, regulatory constraints, the potential for uptake by NAW Clients or other barriers to servicing the total addressable market;

(i) the NAW Agreement had a term of three years;

(j) the NAW Agreement allowed NA Williams to terminate with 90 days' notice;

(k) the NAW Agreement did not, and could not, oblige NA Williams or any of the NAW Clients to use GetSwift's services or to make deliveries using the

GetSwift Platform, and did not, and could not, oblige NAW Clients to enter into any agreement with GetSwift;

(l) in order for GetSwift to generate any revenue under the NAW Agreement, GetSwift was required to negotiate and enter into separate agreements with each individual NAW Client either directly or through its agent NA Williams;

(m) Genuine Parts Company (**GPC**) had evaluated the GetSwift Platform and had decided not to adopt it in favour of another platform;

(n) other than GPC, none of the NAW Clients had trialled or agreed to trial the GetSwift Platform;

(o) none of the NAW Clients had entered into any agreement with GetSwift to use the GetSwift Platform; and

(p) NA Williams had not given GetSwift any information about the price that NAW Clients might pay per delivery as no such information was available to NA Williams at the time

(collectively, the **NAW Projection Information**).

1603 From the outset, it is important to highlight that ASIC has pleaded two alternatives to the NAW Projection Information.[2295] Its *first* alternative is that the NAW Projection Information constitutes factual circumstances (a)–(f) and (i)–(q), which removes from the definition of the NAW Projection Information factual circumstances (g)–(h), as there is some dispute as to whether these are matters of fact or supposition, an issue that I will discuss below (at [1611]–[1616]). The *second* alternative is that pleaded in respect of Mr Eagle, namely, factual circumstances (i)–(l) (**Eagle NAW Projection Information**).

1604 Factual circumstances (i)–(k) were not in dispute and were admitted by each of the relevant defendants.[2296] Similarly, factual circumstances (n)–(o) were admitted by GetSwift, Mr Hunter and Mr Macdonald.[2297] The rest of the factual circumstances are disputed, and I will deal with them in turn.

[2295] 4FASOC at [187]; T1219.35–45 (Day 18).
[2296] Defences at [187].
[2297] Defences at [187].

1605 *First*, to prove factual circumstances (a)–(d), ASIC relies on Mr McCollum's evidence, which in summary form was, relevantly, that NA Williams was a representative body for NAW Clients (see [714]); it had no ability to require its customers to use the Platform (and could only expose or market the GetSwift Platform to its customers) (see [747]);[2298] it had no involvement in its customers' delivery operations (see [726]); it did not know what systems its customers were currently using (see [726]); and that he did know whether NA Williams' clients would be interested in using the GetSwift Platform: see [726].[2299] GetSwift contend, in somewhat of a throwaway flourish, that the evidence of Mr McCollum, when viewed as a whole, "tends firmly" against a finding that factual circumstances (b) and (c) existed (but advance no submission in respect of factual circumstance (a)).[2300] The fact is however, Mr McCollum's evidence on these issues was not challenged during the course of cross-examination, is not inherently improbable, and I am inclined to accept it: see *Precision Plastics* (at 370–371 per Gibbs J, Stephen J agreeing at 372, Murphy J generally agreeing at 372); *Ashby v Slipper* (at 347 [77] per Mansfield and Gilmour JJ).

1606 *Secondly*, GetSwift disputes factual circumstance (d) on the basis of Mr McCollum's evidence and says that it has not been established that GetSwift did not know whether NA Williams' clients would be interested in using the GetSwift Platform (see [739]–[740]) for two reasons: *first*, the position he communicated to Mr White and/or Mr Macdonald, namely that "by and large the concept was received favourably by our customers" and that NA Williams would be excited to move forward with GetSwift (see [740]); and *secondly*, that at the 27 July 2017 meeting, he said to Mr Macdonald that he thought the GetSwift Platform would be a "great fit" for NA William's customers, and that he was "excited" about the opportunity GetSwift presented.[2301] It is said that even if NA Williams did not "know", but only believed, that its customers would be interested in the GetSwift platform, the distinction is utterly immaterial; NA Williams' understanding of its customers was peerless and so it had a sound basis for its belief.

[2298] McCollum Affidavit (GSW.0009.0035.0001_R) at [24].
[2299] McCollum Affidavit (GSW.0009.0035.0001_R) at [19(c)(iv)].
[2300] GCS at [990].
[2301] GCS at [991].

1607 I disagree. Knowledge and belief are two different things. The former imputes notions of objective certainty, while the latter imputes notions of subjective contention: see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* [2021] FCAFC 133 (at [96]–[99] per Lee and Wheelahan JJ). While NA Williams' understanding of its customers may have been peerless, this cannot serve to transform the latter into the former.

1608 *Thirdly,* GetSwift takes issue with meaning of 'independent' in factual circumstance (e), asserting that because NA Williams gave GetSwift the benefit of its own considerable knowledge and experience in quantifying the annual number of deliveries, the descriptor "independent" is apt.[2302] Further, in what appears to be an alternative submission, GetSwift argues that because Mr White was acting as a consultant or "advisor" to GetSwift, he was therefore providing "independent" information and expertise to it – a contention said to be supported by Mr McCollum's acceptance of the proposition that Mr White "is a man whose views you would have accepted as accurate in relation to the number of deliveries done by GPC …. a former executive of GPC with a lot of knowledge of that business": see [736]. [2303]

1609 These submissions should be rejected. Any characterisation of NA Williams disclosing "independent" data in support of quantifying annual numbers of deliveries, giving that term its ordinary meaning (i.e. "not depending upon the existence or action of others, or of each other; existing, acting, conducted, or obtained in a way apart from and unaffected by others"), is simply incorrect: *Oxford English Dictionary Online* (Oxford University Press, October 2021). It is also at odds with the evidence of Mr McCollum, who stated that NA Williams had not provided any specific data to GetSwift: see [763]. Indeed, I do not accept NA Williams' own "considerable knowledge and experience" can transmogrify its own assessment of certain figures into independent ones. Similarly, I find it difficult to accept Mr White can be considered "independent" if he was acting as an *advisor* to GetSwift: see [722]. In the absence of GetSwift providing any further source of the data or research, I am satisfied that NA Williams did not disclose to GetSwift any independent information or research to assist in quantifying the annual numbers of deliveries for either the entire automotive aftermarket or channel customers.

[2302] GCS at [992].
[2303] GCS at [992].

1610 *Fourthly*, GetSwift appears to contend that the estimate referred to in factual circumstance (f) was based on data because figures such as 10 per cent of sales and 240 million might have been discussed at the meeting on 27 July 2017: see [734]–[735].[2304] However, as I previously found, although Mr McCollum was not prepared to dispute that the figure was 240 million, he did not recall "hearing that [GPC] had given GetSwift a specific number": see [733], [735]. Indeed, he was "not involved" in preparing the NAW Transaction Projection and did not know how the figure was arrived at, and had assumed that the number was derived from the meeting on 27 July 2017, or alternatively from high level discussions about specific accounts, which were then expanded to cover the entire North American aftermarket. In any case, he confirmed that NA Williams had not provided such data: see [763]. As such, I reject the submission that the discussions at the meeting on 27 July 2017 were based on anything other than a high level estimate – factual circumstance (f) is therefore made out.

1611 *Fifthly*, with reference to the alternative pleading, as noted at [1603], GetSwift contends that subparagraphs (g) and (h) of the NAW Projection Information, which concern whether the research and discounting that GetSwift took to calculate the NAW Transaction Projection, are matters of opinion and, accordingly, GetSwift cannot be found to have been aware of these elements unless ASIC establishes that one of Mr Hunter, Mr Macdonald or Mr Eagle *believed* that the research and discounting were inadequate.[2305] In support of this submission, GetSwift relies on the *dicta* of Perram J in *Grant-Taylor* (at 755–756 [156]–[157]) and of Beach J in *Myer Holdings* (at 232 [1136], 236–238 [1168]–[1173]), which I have made reference to above at [1081]–[1085].

1612 ASIC submits that whether or not GetSwift had discounted the NAW Transaction Projection or conducted independent research, and whether this was adequate, is an objective fact and does not involve the formation of an opinion or belief. ASIC has not pleaded that GetSwift *believed* that its discount to the NAW Transaction Projection was inadequate, or that GetSwift *believed* that its research in relation to the NAW Transaction Projection was inadequate. As such, ASIC says that it does not need to establish such a belief on the part of one of Mr Hunter, Mr Macdonald or Mr Eagle for GetSwift to have been aware of these elements because objectively

[2304] GCS at [955], and [993].
[2305] GCS at [994].

speaking, GetSwift did not disclose that it had not, in fact, discounted the NAW Transaction Projection or conducted independent research, but that it was instead "speculative" or "a swag or a swing at best": see [765].[2306]

1613 It is necessary to recall exactly what is pleaded in relation to these subparagraphs:

> (g) [GetSwift] did not, **alternatively** did not adequately, discount the NAW Transaction Projection to take into account competition, regulatory constraints, uptake by NAW Clients or other barriers to servicing the total addressable market;
>
> (h) [GetSwift] did not, **alternatively** did not adequately, conduct independent research to ascertain the competition, regulatory constraints, the potential for uptake by NAW Clients or other barriers to servicing the total addressable market[2307]

1614 When the pleading is extracted in this way, it seems to me the question presented is twofold. If the *first* alternative is taken for each subparagraph, the subparagraph is an objective fact; the question of whether, for example, GetSwift discounted the NAW Transaction Projection to take into account competition, regulatory constraints, uptake by NAW Clients or other barriers to servicing the total addressable market, presents a binary answer to be assessed on an objective basis: they did or they did not. If the *second* alternative is taken for each subparagraph, the use of the term "adequate" injects an element of subjectivity as to whether the subparagraph is made out; to use the words of the authorities, it becomes a matter of "opinion". In this sense, to the extent ASIC submits that it did not plead GetSwift *believed* that its discount to the NAW Transaction Projection was inadequate, or that GetSwift *believed* that its research in relation to the NAW Transaction Projection was inadequate, this cannot displace the substance of what is being pleaded; that is, factors which require a subjective assessment on the part of the directors. I will deal with the former *objective* alternative here, before turning to the *subjective* alternative in the awareness section (although, as will become evident, both alternatives fail).

1615 Subparagraph (g) can be dealt with shortly. The language of "potentially yield in excess" gives some suggestion the NAW Transaction Projection of 1.15 billion represents a subset of a larger

[2306] ASIC Reply at [344].
[2307] 4FASOC at [187(g)]–[187(h)] (emphasis added).
.

number of transactions. This is solidified by the fact that using the top end of the scale of $0.29 per transaction with an estimate of 1.15 billion transactions a year, represents annual revenues of $333.5 million, and given the NAW Revenue Projection ($138 million) represents approximately 41 per cent of $333.5 million, there seems to have been some sort of discounting. I am therefore not satisfied that GetSwift *did not* discount the NAW Transaction Projection. Indeed, Mr McCollum gave evidence that at 27 July meeting, Messrs White, Hunter and Macdonald and McCollum "discussed discounting the total addressable market figure to reflect the fact that not all stores provide delivery services, especially for its retail customers".

1616 Similarly, if subparagraph (h) were the former alternative, I am not satisfied of its existence. While I accept that Mr Wilson (of GetSwift) and Mr Hunter exchanged emails in the preparation of the First NAW Announcement (see [756]–[757]) in which Mr Hunter responded to a query as to "how did the math get so high on their addressable transactions/year?", by stating "I checked with Roger – think of [it] this way. GPC by themselves do more than 240m per year", I cannot rule out that no other inquiries were undertaken. On the evidence before me, I am not satisfied that the proposition posed by the former alternative of subparagraph (h) – that GetSwift *did not* conduct independent research to ascertain the competition, regulatory constraints, the potential for uptake by NAW Clients or other barriers to servicing the total addressable market – is correct.

1617 *Seventhly*, in relation to factual circumstance (l), it appears the defendants accept this information factually existed, but dispute its general availability (which I will return to below).[2308] In any event, I am satisfied that Mr McCollum's evidence establishes that NA Williams could not have required its customers to use the GetSwift platform and that NA Williams was only able to expose or market the GetSwift platform to its customers: see [747]. That is confirmed by clause 2 of the agreement, which provided that: "*All sales negotiations and marketing services provided by NAW* for the account of GETSWIFT shall be conducted in accordance with such prices, terms and conditions as specified by GETSWIFTS' policies as communicated by GETSWIFT from time to time".[2309]

[2308] See GCS at [1001]; ECS at [325].
[2309] GSWASIC00032668 (emphasis added).

1618 *Eighthly*, as to factual circumstance (m), GetSwift contends that ASIC has failed to establish that GPC decided not to adopt GetSwift in favour of another platform.[2310] This is incorrect. The documentary evidence indicates that although GetSwift had submitted a proposal to provide its product to GPC in May 2017, GetSwift received notification the same month, through Mr Hunter, that "the proposal from GetSwift was not selected". The email of 15 May 2017 stated (see [720]–[721]):

> After careful evaluation, we've determined your base product and reporting are not as robust as other solutions we have been testing and believe it would require extensive modifications to have it **compare [*sic*] to the product we've selected**.
>
> ….
>
> We regret to inform you the proposal from GetSwift was not selected for award.
>
> (Emphasis added).

1619 Given the email expressly stated "compare[d] to the product we've selected", I am satisfied that factual circumstance (m) existed.

1620 *Ninthly*, as to factual circumstance (p), GetSwift appears to rely on Mr McCollum's evidence that at the meeting on 27 July 2017, there was a discussion about the price per delivery that customers *might* be prepared to pay GetSwift (see [729]–[730]), and as such, factual circumstance (p) has not been established.[2311] While a price range of between eight and 15 cents or 10 to 15 cents per delivery appears to have been discussed, the evidence indicates is that it was actually Mr Macdonald who identified a range of prices as opposed to NA Williams indicating the prices that would be accepted by its customers: see [729]–[730]. While it is true that Mr McCollum did not disagree that this price range was discussed, he did not agree to this price, or any price, at the meeting in July 2017 or subsequently: see [730]. Moreover, I accept that the second limb of this element, namely that no such information was available to NA Williams at the time, is established by Mr McCollum's evidence that besides the meeting on 27 July 2017, there were no discussions about the price per transaction for use of the GetSwift Platform and that it was only *after* 12 September 2017 that he learnt how much GetSwift's competitors proposed to charge: see [795]. To this end, I accept that the factual circumstance

[2310] GCS at [1002].
[2311] GCS at [1004].

(p) existed. I should note for completeness that I do not accept GetSwift and Mr Hunter's contention that because Mr McCollum did not say anything against the reasonableness of the proposed price range, this factual circumstance did not exist.[2312] It does not follow that Mr McCollum's silence establishes that it was NA Williams who provided GetSwift with the price ranges.

Awareness

1621 It is then necessary to turn to the awareness of each of the directors as to the NAW Projection Information.

1622 While not expressly admitted, I am satisfied that both Messrs Hunter and Macdonald were aware of factual circumstances (a)–(d) by reason of their involvement at the 27 July 2017 meeting: see [724]–[737]. Further, there can be no real dispute that Messrs Hunter and Macdonald were aware of factual circumstances (i)–(l) given their involvement in negotiating and drafting the NA Williams Agreement: see [724]–[737], [741]–[748].

1623 Mr Hunter submits that the evidence does not establish that he had actual knowledge of factual circumstances (e).[2313] I disagree. The evidence makes it clear that Mr Hunter was centrally involved in the discussions with Mr McCollum and in the communications concerning the First NAW Announcements: see [749]–[761]. Indeed, Mr Hunter was the one who inserted the NAW Transaction Projection and the NAW Revenue Projection: see [750] and [783]–[784]. I am therefore satisfied he knew NA Williams had not disclosed to GetSwift any independent data or research to assist in quantifying the annual numbers of deliveries for either the entire automotive aftermarket or channel customers.

1624 The position with respect to Mr Macdonald is a little less straightforward. There is no evidence that Mr Macdonald was involved in the formulation of the NAW Projections in the First NAW Announcement, other than his presence at the meeting of 27 July 2017. Indeed, while it appears he was aware of the 2.4 billion deliveries figure that seemed to originate from the 27 July 2017 meeting, there is no indication that he was involved in, or was privy to, the way in which Mr Hunter reduced this figure to 1.15 billion. While I accept that Mr Macdonald engaged with the

[2312] GCS at [1004]; HCS at [211].
[2313] HCS at [208].

announcement, this was at a superficial level, simply correcting the capitalisation of two words as well as suggesting that it be formatted using the new template: see [775]. In weighing the evidence as a whole, I am simply not satisfied that Mr Macdonald knew that NA Williams had not disclosed to GetSwift any independent information data or research to assist in quantifying the annual numbers of deliveries for either the entire automotive aftermarket or channel customers. The fact is that Mr Macdonald did not engage with the figure, and in any event, was forwarded an email that indicated Mr McCollum was content with the figure: see [762]. This is not to mention that there was email communications between Mr Hunter and Mr Wilson about the figure, to which Mr Macdonald was not copied: see [756]–[757]. I note that this finding should be reconciled with my findings with respect to the CBA Projection Information. There I was satisfied that Mr Macdonald knew the CBA Projections were false and had not been approved by the CBA. The point of distinction is that in respect of the CBA Projections, Mr Macdonald was copied to an email which outlined the rationale underpinning the projections (which demonstrated that the projections were inherently linked to such figure) (see [245]–[248]), as well as emails which made explicit that the merchants figure bring used was wrong: see [348] and [352]. This was not the case here.

1625 Closely mirroring GetSwift's submission above at [1611], Mr Hunter says that the alleged "information" in subparagraphs (f)–(h) is in the nature of an opinion, not held by GetSwift and certainly not by Mr Hunter.[2314] It is notable that compared to GetSwift's submission on this issue, which encompass subparagraphs (g) and (h), Mr Hunter's argument encompasses subparagraph (f). I am far from convinced that this additional element – that the NAW Transaction Projection was based on a high level estimate of the total addressable market for the GetSwift Platform in the North American automotive aftermarket industry – is properly characterised as an opinion but, in any event, any such a classification process can be distracting. The issue is whether there was an awareness of *information* (conscious of the fact, as explained above, the word "aware" is a defined term in the Listing Rules). I am satisfied Mr Hunter was aware of factual circumstance (f) the NAW Projection Information, by reason of him attending the 27 July 2017 meeting, and drafting the First NA Williams Announcement: see [724] and [763].

[2314] HCS at [210].

1626 My reasoning with respect to Mr Macdonald is much the same in respect of factual circumstance (f). I am simply not satisfied Mr Macdonald knew where the final NAW Transaction figure came from. Indeed, he would have gained comfort from the fact that he was forwarded an email in which Mr McCollum appeared to provide his imprimatur for the figure: see [762].

1627 The position with respect to subparagraphs (g) and (h) is a little more complex when the second alternative of the relevant part of the pleadings is brought into focus; that is, by injection of the term "adequate": see [1613]. While I should repeat that I do not consider the *dicta* in *Grant-Taylor* (at 755–756 [156]–[157] per Perram J) and *Myer Holdings* (at 232 [1136], 236–238 [1168]–[1173] per Beach J) to reflect some general statement of principle that is applicable (contrary to the submissions of the defendants), this does not matter for present purposes because not only am I not satisfied such opinions alleged were actually held by Mr Hunter and Mr Macdonald but, more relevantly, I have not reached the level of satisfaction to conclude they were opinions the directors *ought to have* held by reason of facts that were known to them.

1628 Mr Hunter's primary submission is that he had a good reason to believe, on the facts known to him, that the NAW Transaction Projection was reasonable. That submission is developed as follows: (a) Mr Hunter had twice sent Mr McCollum a draft announcement containing the estimate expressing that it was a "joint estimate" from NA Williams and GetSwift (see [750]–[753] and [759]–[761]) and that in response to these emails, Mr McCollum informed Mr Hunter that he had no issue with the joint estimate; (b) when Mr Hunter was questioned by Mr Wilson about the 1.15 billion, Mr Hunter responded: 'I checked with Roger" (see [757]); (c) Mr McCollum was best placed to provide the estimate of the number of transactions likely to result from the deal; and (d) when these circumstances are viewed from Mr Hunter's perspective, the 1.15 billion estimate had been "joined in" by the person in the best position to give such an estimate and that there can be no reason to conclude other than that Mr Hunter himself regarded the estimate as reasonable.[2315]

1629 I am not satisfied that I can reach the affirmative conclusion that Mr Hunter's view could be characterised as unreasonable (although I have real doubts as to whether, on the facts known

[2315] HCS at [212]–[214].

to him, it was reasonable). But this is an unusual circumstance where Mr Hunter had twice sought to confirm the validity of the figure: see [750], [759]. I accept that Mr McCollum's evidence that he did not know how the figure of "1.15 Billion (1,150,000,000) transactions a year" was arrived at, assumed it was a high level estimate from the 27 July 2017 meeting that both he and Mr Hunter attended, and that NA Williams had not provided any information, data or research to help GetSwift quantify any sort of figure because he doubted that such information existed (see [763]). I also accept that when Mr McCollum read the draft announcements, he did not consider "whether 1.15 billion was accurate" (see [766]) and "estimate[d] that this would be a potentially correct number of deliveries that would be available to GetSwift if they *captured the entire market*" (see [767]). But to rely on this evidence to assess the opinions actually held by Mr Hunter would be erroneous. That is because this evidence is an *ex post* examination of what Mr McCollum was thinking at the time, but there is no evidence he communicated it to Mr Hunter. Indeed, as Mr Hunter highlights, Mr McCollum received various drafts of the NA Williams agreement and did not make a peep as to the NAW Transaction Projection: see [750]–[761].

1630 Mr Macdonald also contends that ASIC has failed to establish he was aware of subparagraph (g) and (h), given the evidence suggests that the discount from 2.4 billion deliveries per annum to 1.15 billion was calculated by Mr Hunter and there is no evidence as to how that occurred or what Mr Macdonald himself knew about what research had or had not been undertaken.[2316] Relatedly, his submission proceeds on the basis that he was entitled to conclude that the projections in the First NAW Announcement as calculated by Mr Hunter (but with the benefit of Mr White and Mr McCollum) were likely to yield a reliable result,[2317] and that he did not know that the NAW Projection Information was a sufficient qualification on the reliability of the projections in the First NAW Announcement.[2318] Briefly, Mr Macdonald draws upon a number of matters concerning his knowledge, including that he was aware of: (a) general matters concerning NA Williams; (b) that GetSwift was working with Mr White; (c) information pertaining to the 27 July 2017 meeting; (d) that Mr Hunter had calculated the

[2316] MCS at [471].
[2317] MCS at [478].
[2318] MCS at [474], and [478].

total addressable market of 1.15 billion and that Mr McCollum did not raise concern over it; and (e) that Mr McCollum was best place to form a view as to the figure.

1631 This submission should be accepted. I accept Mr Macdonald was present at the 27 July 2017 meeting with Mr Hunter, Mr McCollum and Mr White (see [724]), received the first draft of the NAW Announcement which contained the NAW Transaction Projection and was also a recipient of communications between Mr Hunter and Mr McCollum.[2319] But this cannot raise to the level to make out his awareness of subparagraphs (g) and (h), actual or constructive.

1632 For these reasons, I am not satisfied that Mr Hunter and Mr Macdonald were aware of subparagraphs (g) and (h) of the NAW Projection Information. I therefore proceed on the basis of the alternative pleaded combination of the NAW Projection Information, which I have founded existed and of which Mr Hunter and Mr Macdonald were aware.

1633 Mr Hunter and was clearly aware of factual circumstance (m) by reason of the fact he received the email from Mr Richards of GPC on 15 May 2017, noting that "[w]e regret to inform you the proposal from GetSwift was not selected for award": see [720]. I am also satisfied Mr Macdonald was also aware of this fact given he was forwarded the email from Mr Hunter: see [721].

1634 Similarly, I am satisfied that Messrs Hunter and Macdonald were aware of factual circumstance (o)–(n), given that they were the main points of contact with NA Williams and there had not been a peep as to a deal being signed, and they had received no indication that things had been progressing: see [724], [801].

1635 Finally, I am satisfied that Messrs Hunter and Macdonald were also aware of the factual circumstance (p), primarily due to their involvement in the 27 July 2017 discussions. While a price range was discussed at the meeting, the evidence reveals this was volunteered by Mr Macdonald (see [729]–[730]) and while not disputed, the evidence is contrary to NA Williams providing information about the price range that client might pay per delivery. Moreover, Mr McCollum gave evidence that a price was not thereafter discussed.

[2319] MS at [445]–[449], [451]–[452].

1636 In summary, I find that Mr Hunter was aware of factual circumstances (a)–(f) and (i)–(p) (that is the whole of the refined set of the NAW Projection Information) and Mr Macdonald was aware of factual circumstances (a)–(d) and (i)–(p).

1637 ASIC's case against Mr Eagle concerns the Eagle NAW Projection Information, that is, factual circumstances (i)–(l) of the NAW Projection Information. From the outset, I note Mr Eagle submits that given the case relating to him consists of a subset of the information, he cannot be involved in GetSwift's contravention as it pertains to the whole of that information.[2320] It is said that to be knowingly involved in a contravention, an accessory is required to have actual knowledge of *all* of the essential elements of the contravention. Indeed, Mr Eagle submits that an essential element of the contravention by GetSwift is that it knew of all of the NAW Projection Information (as defined in the 4FASOC), and that all of that information was material within the meaning of ss 674 and 677 of the *Corporations Act*. If GetSwift contravened s 674(2) by knowing of, and not disclosing, the NAW Projection Information which comprises more than just the Eagle NAW Projection Information, then it is said Mr Eagle cannot be knowingly involved in that contravention by GetSwift if he knew only some subset of that broader NAW Projection Information which founds the company's contravention.

1638 To my mind there are two facets to the argument advanced by Mr Eagle. The *first*, which seems to be the focus of Mr Eagle's submissions in writing, is that where a contravention is alleged against GetSwift, the information said to constitute that contravention cannot be deconstructed and partially applied to Mr Eagle. I reject this blanket submission. Indeed, it ignores the alternate ways in which ASIC has pleaded the NAW Projection Information, which specifically defines the Eagle NAW Projection Information by reference to the subset of information constituted by 4FASOC [187(i)–(l)].[2321] That is, what is pleaded is a *discrete contravention*. In any event, it was the *second*, and in my view, more substantive point, which was the focus of oral submissions. That is, the case against Mr Eagle in respect of NA Williams can only succeed if I am satisfied that he was aware of the subset of information pleaded and that the subset of information, on its own was material. In fact, Mr Potts SC only seemed to press the latter of these contentions, stating in closing submissions, "[i]f your Honour was satisfied of the

[2320] ECS at [321].
[2321] ASIC Reply at [365].

materiality and knowledge of the subset and your Honour was satisfied that Mr Eagle had knowledge of it then we would lose."[2322] This seems to me to be the correct approach to adopt; any other would proceed on the basis that a contravention under s 674(2) is not made out, which must be incorrect.

1639 As to his awareness of each of these elements, I note that Mr Eagle was involved in drafting the NAW Agreement up until its execution (noting my previous comments at [1586]).[2323] Subject to one qualification below, I am therefore satisfied that he had knowledge of the contents of the NAW Agreement. Given such involvement, it follows that he would have been aware of the specific elements of the Eagle NAW Projection Information on and from 12 September 2017.

1640 The one qualification is that Mr Eagle disputes being aware of factual circumstance (i) – that the NA Williams Agreement had a term of three years. Mr Eagle's submission is developed as follows. He says there is no evidence that he was provided with a copy of any further draft of the NAW Agreement, or the final NAW Agreement, after 18 August 2017, and that it was only on 5 September 2017, when he received a draft of the First NAW Announcement from Mr Hunter and Mr Macdonald, that the term of the NAW Agreement being five years appeared. Given Mr Eagle had not seen the signed NAW Agreement, he says that he was entitled to assume that Messrs Hunter and Macdonald had correctly identified the term of the final agreement, and that it was hardly a fanciful possibility that the final agreement may have been for five years, given that was the term originally proposed by NA Williams.[2324] To further this argument, Mr Eagle relies on the fact that: (a) Mr Macdonald did not identify the five years as a "material error" when Mr Macdonald approved the First NAW Announcement; (b) during the email exchange on 12 September 2017, Mr Hunter did not amend the reference to the five year term in the sentence initially proposed by Mr Banson; (c) Mr Macdonald approved Mr Banson and Mr Hunter's proposed sentence in the Second NAW Announcement, without identifying as a "material error" the reference to the five year term; and (d) Mr McCollum, who was sent a draft

[2322] T1187.5–7 (Day 18).
[2323] GSWASIC00031766_R; GSWASIC00057029; GSWASIC00059745_R; GSWASIC00031761_R; GSWASIC00059748_R.
[2324] ECS at [328].

of the announcement, did not himself pick up the error in the description of the term of the NAW Agreement as executed, and he had signed the agreement.[2325]

1641 This issue is an interesting one. While it is true that Mr Eagle saw a final draft of the NAW Agreement with a proposed term of three years, provided comments on the draft and was told that his comments had been incorporated into the announcement (see [744]), I am simply not satisfied, given his limited involvement in the actual drafting and negotiation of the NAW Agreement, that, when he saw the five year term in the announcement, he saw this as an error; particularly given that was the term originally proposed by NA Williams. It is bordering too far on speculation to assert that he must have been aware, as any reasonable director would have been in the light of his previous knowledge and involvement in drafting the agreement, that the NAW Announcement misstated the terms of the agreement. I am therefore not satisfied Mr Eagle was aware of factual circumstance (i) of the Eagle NAW Projection Information.

1642 In any event, by reason of the knowledge of Mr Hunter, Mr Macdonald and Mr Eagle (to a very limited extent), I am satisfied that GetSwift was aware of the NAW Projection Information from 12 September 2017. GetSwift, Mr Hunter and Mr Macdonald have admitted that beyond what was stated in the First and Second NAW Announcements, GetSwift did not notify the ASX of the NAW Projection Information from 12 September 2017 until the date of this proceeding.[2326]

General availability

1643 GetSwift contends that parts of the NAW Projection Information were generally available because they were disclosed in the NAW Announcements.[2327] These assertions do not withstand scrutiny. It is necessary to deal with GetSwift's submissions in respect of the factual circumstances it contends were not generally available in turn.

1644 *First*, GetSwift submits that factual circumstance (a) was generally available from, at the least, the content of the NAW Announcements, which stated that NA Williams was a "representative group" providing "merchandising services, research, training, marketing, consulting, call

[2325] ECS at [328]–[329].
[2326] Defences at [189].
[2327] First NAW Announcement (GSW.1001.0001.0864); Second NAW Announcement (GSW.1001.0001.0866).

center [*sic*] and sales" services.[2328] While this might be said to be a clear disclosure of the first limb of factual circumstance (a), what is not apparent from the First and Second NAW Announcements is the second, and in my view, critical limb of this factual circumstance (i.e. that NA Williams could not compel its customers to enter into any agreements with GetSwift).[2329] While I accept that the use of the term "representative" indicates a form of agency relationship with a degree of detachment between NA Williams and those "manufacturers, retailers, and distributors" which they "serve", there is no indication as to the nuances of that relationship. To my mind, and without some hesitation, I have reached the view that the critical limb of this factual circumstance was not generally available. Indeed, the relatively secure revenue and deliveries projections provided in the Second NAW Announcement, indicates to my mind that if clients of NA Williams wanted to use their services, they would have to follow their lead.

1645 *Secondly*, GetSwift submits that factual circumstance (f) of the NAW Projection Information was generally available given the NAW Announcements stated that "NA Williams and [GetSwift] estimate that this structure will *potentially* yield in excess of 1.15 Billion (1,150,000,000) transactions a year *when fully implemented*".[2330] It says that it was apparent from this statement that the NAW Transaction Projection was a high level estimate that must have been based on the total addressable market as any rational assessment of the potential opportunity for GetSwift would be.[2331] But I am not convinced this logic holds. GetSwift's contention involves a significant conceptual jump that I do not think an objective reasonable investor would reach, namely, that from the words "potentially" or "when fully implemented", it was generally available that the estimate was based on the total addressable market (rather than the market which, with proper discounting, would actually have been achievable). The fact is, the NAW Announcement did not disclose that the figure of 1.15 billion transactions per year when fully implemented was an estimate of the *total addressable market*. As such, I am not satisfied that this element was generally available.

[2328] GCS at [989].
[2329] ASIC Reply at [343].
[2330] GCS at [993] (emphasis added).
[2331] GCS at [993].

1646 *Thirdly*, GetSwift submits that factual circumstance (k) was generally available for the same reasons it advanced concerning factual circumstance (a): see [1644]. This submission however suffers from the same defect, namely that the NAW Announcement did not state that NA Williams could not oblige NAW Clients to enter into any agreement with GetSwift or use the GetSwift Platform, and for the reasons I have outlined, I do not think this should be inferred.

1647 *Fourthly*, as to factual circumstance (l), while GetSwift contends that the NAW Announcements clearly showed that the end customer was the "NAW Client", being the "manufacturers, retailers and distributers",[2332] this does not prove that this factual circumstance was generally available. Indeed, the NAW Announcements do not reveal that GetSwift was required to negotiate and enter into agreements with NAW clients to generate any revenue.

1648 *Finally*, I should make note of Mr Younes' evidence discussed above (at [1133]–[1135]), that he understood the NA Williams arrangement "would involve an initial pilot of the product in select parts of the network" and "if for any reason an initial pilot wasn't successful or to the customer's liking the customer might cease using the software" and that the revenue figure was "a stretch".[2333] GetSwift contends that it was therefore generally known by the market and investors that even *after* a client contract was entered into by GetSwift, there would be a process of onboarding, roll out and integration, or that there would be trials or pilots; each interchangeable descriptions used to convey that there would be a period of time during which the efficacy, operation and functionality of GetSwift's platform would continue to be tested. Along with noting that there is always a need to keep in mind that the surmise reached by one person about a particular factual circumstance does not establish that the omitted information "could have been observed readily, meaning easily or without difficulty": *Grant-Taylor (FC)* (at 424 [119] per Allsop CJ, Gilmour and Beach JJ), the more fundamental question I pose is: where does this contention go?

1649 Other than discussing this part of the evidence in its general contentions, and making it clear that Mr Younes' evidence should apply to NA Williams,[2334] GetSwift does not rely on this evidence in any part of its submissions that deal specifically with the general availability or

[2332] GCS at [1001].
[2333] T782.14–783.45 (Day 11). See also in relation to Amazon T788.18–30 (Day 11).
[2334] GCS at [209] and [278(c)].

materiality of the NAW Projection Information. Moreover, it is not clear to me how Mr Younes' evidence relates to any of the elements that form part of the NAW Projection Information. The closest might be in regards to element (j), which concerns how the NA Williams Agreement allowed NA Williams to terminate with 90 days' notice. But that element does not concern an initial pilot or trial period. To this end, I am not convinced that this general contention is of any real significance in respect of GetSwift's case concerning NA Williams.

1650 GetSwift does not advance any submissions as to the other factual circumstances, and I am satisfied that they were not generally available given these matters (such as the fact that NA Williams had not given GetSwift any information about the price that NAW Clients might pay per delivery) were not in the public domain, or that it was information that could be deuced from any publicly available information.

1651 Accordingly, I am satisfied that the NAW Projection Information was not generally available.

Materiality

1652 GetSwift advance an assortment of arguments concerning the factual circumstance comprising the NAW Projection Information and how they should not be considered material. Taking each in turn (and dealing with only those I have found are made out up to this point):

(1) as to factual circumstances (b) and (c), GetSwift submits that it is unclear how these particular matters could have been material,[2335] although it does not expand upon this argument with any particular clarity;

(2) as to factual circumstance (e), it is said there could be nothing material about the fact that NA Williams had not disclosed such information, data or research to GetSwift;

(3) as to factual circumstance (h), GetSwift submits that the mere fact of the absence of "independent research" would not have been material to the market unless it meant that certain information was not disclosed;[2336]

(4) in respect of factual circumstance (i), GetSwift contends that any announcement that the NAW Agreement was for three years is unlikely to have been material given statements that the "fulfilment of this vertical will take at least 15-19 months", that it

[2335] GCS at [990].
[2336] GCS at [996].

would take "at least 15-19 months" to achieve the opportunity, and to the extent that the market anticipated benefits accruing beyond three years, it would be in the mutual benefit of the parties to extend the relationship for a period necessary to capture those benefits, such that the market would have expected the relationship to continue, notwithstanding the length of the term;[2337]

(5) in respect of factual circumstance (j), it is said that the fact that NA Williams could terminate with 90 days' notice is unlikely to have been material, given that the right to terminate would likely only have been exercised in circumstances where the agreement was not generating benefits to the two entities;[2338]

(6) as to factual circumstance (m), GetSwift submits that ASIC has not established the reasons for GPC's decision not to use GetSwift's platform, and the degree to which GPC was representative of the customers of NA Williams;[2339]

(7) as to factual circumstance (n) and (o), GetSwift contends that the fact that none of the NAW Clients, apart from GPC, had trialled or agreed to trial the GetSwift Platform could not have been material;[2340] and

(8) as to factual circumstance (q), GetSwift contends that there is nothing material about the fact that NA Williams had not given GetSwift such information.

1653 The immediate issue with these contentions in respect of materiality is that they compartmentalise the factual circumstances into a checklist. This is erroneous. As was made clear in Part E, I reject GetSwift's contention that ASIC pleaded and maintained a case that requires it to prove that *each individual element* of the pleaded categories of information in itself was not generally available and was material.

1654 Framed in this light, the materiality of the NAW Projection Information must be assessed by reference to the First NAW Announcement, which stated that the NAW Agreement was an "exclusive commercial 5 year agreement" which contained figures that were not insignificant (i.e. 1,150,000,000 figure), as well as the Second NAW Announcement, which was marked as "price sensitive" and included specific delivery and revenue projections (i.e. $138,000,000 per

[2337] GCS at [998].
[2338] GCS at [999].
[2339] GCS at [1002].
[2340] GCS at [1003].

year once fully completed). Given the sheer size of each of these figures relative to GetSwift's then level of deliveries and revenue (as reported in the Appendix 4C and other disclosures), I find that each of these announcements would have engendered investor expectations as to future growth and revenue, and reinforced expectations from the Prospectus, the Agreement After Trial Representations and the First Quantifiable Announcements Representation. Indeed, the evidence demonstrates that each of Mr Vogel, Mr Younes and Aesir Capital relied on the information in the First and Second NAW announcements to project future revenue flows and determine the value of GetSwift's shares: see [1173], [1180], and [1218].[2341]

1655 Within this context, I am satisfied that the NAW Projection Information was important contextual and qualifying information that would have influenced an investor's assessment of the information conveyed in the First and Second NAW Announcement. It would have, for example, indicated that the realisation of the benefits was significantly less certain, given NA William was not itself involved in members' delivery system and could not compel members to enter into agreements with GetSwift. It would have also qualified the NAW Projections (including the NAW Transaction Projection and NAW Revenue Projection), given the absence of any information as to the price that NA Williams' customers might be willing to pay. Indeed, I am satisfied that the NAW Projection Information would have played an important role in influencing investors as to whether to acquire or dispose of GetSwift shares. For completeness, I note that I am satisfied the NAW Eagle Projection Information is material, principally by reason of factual circumstances (k) and (l).

Conclusion

1656 For the above reasons, I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the NAW Agreement Execution Information from 12 September 2017 until the commencement of this proceeding.

Third NAW Announcement

1657 There is no continuous disclosure case concerning the Third NAW Announcement but it is convenient to set out the discussion on the existence and awareness of this information, which

[2341] ACS at [1535].

I will refer to when I discuss ASIC's misleading and deceptive conduct claims below (at Part I).

1658 It was common ground that on 31 October 2017, GetSwift submitted to the ASX an announcement entitled "Quarterly Update and Appendix 4C" (**Third NAW Announcement**).[2342] The documentary evidence reveals that each of the directors received a confirmation email from Mr Banson, informing them that the quarterly report and Appendix 4C was released to the ASX before the opening of the market: see [800]. It was also common ground that the Third NAW Announcement stated: (a) additional global client "on boarding" is underway to utilise GetSwift's SaaS solution to optimise delivery logistics; (b) a notable client signed for the September quarter was NA Williams within a new vertical segment (North American Automotive Industry) poised to deliver more than 1 billion transactions per year when fully implemented; and (c) under the exclusive five year contract with NA Williams, the GetSwift Platform will expand into a new automotive vertical, with an estimated more than 1.15 billion transactions per year once fully implemented and with an estimated US$138,000,000 recurring revenue each year.[2343]

1659 Mr Hunter admitted that he contributed to the drafting of the Third NAW Announcement,[2344] and Mr Macdonald was copied into a number the draft versions of the Appendix 4C and incorporated changes into the draft: see [796]–[798]. Mr Eagle also provided his comments on the draft Appendix 4C: see [797]. Finally, each of the directors received the final draft of the Appendix 4C in an email from Mr Ozovek on 29 October 2017 with the subject line: "4C – Final Review Before Lodging": see [798]. Accordingly, I am satisfied that each of Messrs Hunter, Macdonald and Eagle had knowledge of the content of the Third NAW Announcement, and were content with what had been transmitted to the ASX.

1660 I will return to the Third NAW Announcement when I address the alleged misleading and deceptive conduct below.

[2342] Defences at [194].
[2343] Defences at [194].
[2344] Defences at [271(m)].

H.3.12 *Johnny Rockets*

1661 ASIC's case in respect of Johnny Rockets concerns GetSwift, Mr Hunter and Mr Macdonald.

Johnny Rockets Agreement

1662 On 21 October 2017, the Johnny Rockets Agreement was signed: see [814]. The material terms of the Johnny Rockets Agreement included that: (a) Johnny Rockets engaged GetSwift exclusively to provide the following services: use of GetSwift's proprietary software platform to provide Johnny Rockets with logistics management, tracking, dispatch, route and reporting of delivery operations, including provision of SMS alerts, related reports and system data dumps; and consultancy advice in relation to those services in a reasonable number of meetings as Johnny Rockets reasonably requests; (b) the agreement was subject to a trial period (referred to as a "Initial Roll out Period"), which was to "run on or about November 1st, 2017 to beginning of December 2017" and was to involve "2 stores"; (c) Johnny Rockets was permitted to terminate the Johnny Rockets Agreement, at any time in the period up to seven days prior to the expiration of the trial period, by giving notice in writing; and (d) if such notice was given, the three-year term of the Johnny Rockets Agreement, which was to start no later than 1 December 2017 or "possibly January 1st [2018] due to budget projection", would not commence and Johnny Rockets would not be obliged to use GetSwift exclusively for its last-mile delivery services.

Johnny Rockets Announcement

1663 The relevant defendants admitted that on 25 October 2017, GetSwift submitted the Johnny Rockets Announcement to the ASX, entitled "GetSwift Signs Exclusive Partnership with Johnny Rockets".[2345] The announcement was marked as "price sensitive" at the request of Mr Macdonald: see [822]. It was also common ground that the Johnny Rockets Announcement stated: (a) GetSwift had signed an exclusive multi-year agreement with Johnny Rockets; and (b) GetSwift's indicative estimates were for a transaction yield in excess of millions of deliveries per year upon complete adoption and utilisation (**Johnny Rockets Projection**).

[2345] Defences at [204].

1664 The documentary record establishes that Mr Hunter, Mr Macdonald and Mr Eagle received email confirmation from Mr Vaughan on 25 October 2017 that the announcement had been released by the ASX and marked as "price sensitive": see [825]. Mr Hunter admitted that he contributed to the drafting of the Johnny Rockets Announcement,[2346] and Mr Macdonald admitted that he directed and authorised the transmission of the announcement to the ASX.[2347] In addition, Mr Macdonald sent an email to Mr Banson (copied to Mr Hunter) on 25 October 2017, in which he attached the final announcement concerning GetSwift's entry into the agreement with Johnny Rockets: see [822]. Accordingly, I am satisfied that both Mr Hunter and Mr Macdonald had knowledge that GetSwift had submitted the Johnny Rockets Announcement to the ASX, and were aware of its contents.

Johnny Rockets Agreement Information

Existence

1665 ASIC submits, and the relevant defendants accept, that at the time of the Johnny Rockets Announcement on 25 October 2017, the following factual circumstances existed: (a) the Johnny Rockets Agreement contained a "limited roll out period" ending 1 December 2017; (b) the "limited roll out period" had not commenced; (c) Johnny Rockets was permitted, at any time in the period up to seven days prior to the expiration of the "limited roll out period", to terminate the Johnny Rockets Agreement by giving notice in writing; and (d) if Johnny Rockets terminated the Johnny Rockets Agreement at any time in the period up to seven days prior to the expiration of the "limited roll out period", then the three-year term of the Johnny Rockets Agreement would not commence; and it was not obliged to use GetSwift exclusively for its last-mile delivery services (collectively, the **Johnny Rockets Agreement Information**).[2348]

Awareness

1666 GetSwift accepted that it was aware of the Johnny Rockets Agreement Information.[2349] As to Mr Hunter and Mr Macdonald, although neither advanced submissions as to their awareness, the documentary evidence reveals that Mr Macdonald negotiated the Johnny Rockets

[2346] Hunter Defence at [347(n)].
[2347] Macdonald Defence at [271(a)(vii)].
[2348] Defences at [206].
[2349] GCS at [1039].

Agreement and his communications were copied to Mr Hunter: see [803]. Moreover, both Mr Macdonald and Mr Hunter received the signed Johnny Rockets Agreement: see [815]. Accordingly, I am satisfied that Mr Hunter and Mr Macdonald had knowledge of the Johnny Rockets Agreement Information on and from 25 October 2017.

General availability

1667 Other than contending that factual circumstances (c) and (d) could be deduced from the Prospectus, which I reject for the reasons as outlined above (at [1117]–[1141]), GetSwift did not dispute that the Johnny Rockets Agreement Information was generally available.[2350] For completeness, I should say that factual circumstances (a) and (b) of the Johnny Rockets Agreement Information were not generally available for the reasons outlined at [1117]–[1141], given that investors would not have discerned that the Hungry Harvest Agreement contained a trial period, which the parties were still within.

Materiality

1668 For the reasons that I have already expressed above in relation to the "Agreement Information" of other Enterprise Clients, I am satisfied that the Johnny Rockets Agreement Information was material. GetSwift's submissions (which are repetitions of its previous contentions), including its reliance on the Absence of Quantifiable Benefits Contention, Continuing Periods Contention and Share Price Contention, should be rejected.[2351]

1669 I should note that in respect of GetSwift's Continuing Periods Contention, while the 9 February 2018 Market Update (see [1056]) and 19 February 2018 Market Update (see [1057]) discussed the existence of trial periods,[2352] like with other Enterprise Clients, there is no reference to Johnny Rockets. I do not consider that general statements concerning trial periods assist GetSwift, meaning nothing in these updates impact upon the general availability or materiality of the information. GetSwift remained obliged to disclose the Johnny Rockets Agreement Information until commencement of this proceeding.

[2350] GCS at [733].
[2351] GCS at [1042]–[1051].
[2352] GCS at [919].

1670 I accept GetSwift, Mr Hunter and Mr Macdonald's admissions that in the period from 25 October 2017 until the date of issue of this proceeding, GetSwift did not notify the ASX of the Johnny Rockets Agreement Information.[2353]

Conclusion

1671 GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Johnny Rockets Agreement Information from 25 October 2017 until the commencement of this proceeding.

Johnny Rockets Termination Information

Existence

1672 GetSwift, Mr Hunter and Mr Macdonald admit that on or about 15 December 2017, Johnny Rockets and GetSwift agreed to postpone the commencement date of the "limited roll out period" to mid-January 2018: see [830]. This was due to OCIMS Interface Licensing Costs.[2354]

1673 Following this, ASIC alleges that on 9 January 2018, Johnny Rockets terminated the Johnny Rockets Agreement (**Johnny Rockets Termination Information**).[2355] This stems from the email that Mr Roman sent to Mr Aiken (of GetSwift) on 9 January 2018, which stated "[u]nfortunately, we will not be able to move forward because of the costs associated with the interface. I sincerely apologize for the inconvenience and wasting of your time": see [831].

1674 The defendants deny the Johnny Rockets Termination Information.[2356]

1675 The factual dispute turns upon the construction of Mr Roman's email.[2357] Specifically, GetSwift, and in a largely similar way, Mr Hunter and Mr Macdonald,[2358] contend that Mr Roman's email was sent in the context of the preceding communications between GetSwift, Johnny Rockets and Mr Roman, which were directed to the progress of setting up a licencing agreement to begin integrating the GetSwift software, and that, on a fair reading of the email,

[2353] Defences at [208].
[2354] Defences at [210].
[2355] Defences at [211].
[2356] Defences at [211].
[2357] GCS at [1054].
[2358] HCS at [232]; MCS at [497].

all that Mr Roman was doing was communicating that Kharafi Global was not prepared to move forward on its proposed licencing agreement because of the costs involved: see [826]–[831].[2359] Of the emails that GetSwift relies on to support this submission, one email from Mr Aiken dated 7 December 2017 provides: "GetSwift is ready to begin development and testing of OCIMS Integration, but is awaiting an interface licensing agreement between Kharafi Global and OCIMS": see [826]. GetSwift says that Mr Roman was implicitly inviting further communications concerning the way in which the costs issue might be addressed, and that when Mr Roman expressed an apology for the "inconvenience" and time wasted, he was referring to the time and effort that had been spent by all parties on exploring the interface licence.[2360]

1676 This submission must be rejected. *First*, GetSwift's analysis omits Mr Ozovek's email to Messrs Hunter and Macdonald in which he forwarded Mr Roman's email and stated that Johnny Rockets was "trying to back out on the deal due to integration costs in their end": see [832]. The words "back out" support a conclusion that Mr Roman had in fact brought the agreement to an end, and that was how it was understood by Mr Ozovek. *Secondly*, GetSwift's interpretation of Mr Roman's email as an implicit invitation for further communications concerning the way in which the costs issue might be addressed is not supported by the terms of the email or the evidence. There is no suggestion that the costs associated with the interface could be mitigated or that efforts were being made to mitigate them. There does not appear to be any implicit invitation in Mr Roman's email; to the contrary, the email's drafting is quite direct and blunt. *Thirdly*, even if it were open to interpret the email as meaning that Kharafi Global was not prepared to move forward on its proposed licencing agreement because of the costs involved, and to interpret Mr Roman's apology as only being in reference to the time wasted in relation to the interface licence (which, itself, does not appear to be a straightforward interpretation), it is difficult to understand how that does not equate to termination. GetSwift's analysis overlooks that, in his email 7 December 2017, Mr Aiken also stated that "further integration efforts are contingent upon an interface licensing agreement between Kharafi Global and OCIMS": see [826]. Further, on 15 December 2017, Mr Aiken sent an email to

[2359] GCS at [1056].
[2360] GCS at [1056].

Messrs Hunter, Macdonald and Ozovek, stating: "Integration development [cannot] begin until the interface license is in place": see [830].

1677 In any event, Mr Roman's email was clear in its terms that Johnny Rockets would "not be able to move forward" with the project. Any sensible reading of the email is that it served as notice to GetSwift that Johnny Rockets was not proceeding.

Awareness

1678 Mr Hunter contends that the evidence does not establish that he was aware that Johnny Rockets had terminated the Johnny Rockets Agreement. He submits that the email received from Mr Ozovek on 9 January 2018 was apt to suggest that the agreement remained on foot, albeit that Johnny Rockets was trying to back out of it.[2361] The issue with this submission is that, notwithstanding what Mr Ozovek stated in his email, Mr Ozovek had also forwarded Mr Roman's email to Mr Aiken, to Mr Hunter. In that email, Johnny Rockets had explicitly stated that it would "not be able to move forward": see [832].

1679 Mr Macdonald does not appear to put in dispute his awareness of Johnny Rockets Termination Information. In any event, I am satisfied that he knew the Johnny Rockets Agreement had been terminated because he was forwarded Mr Roman's termination email dated 9 January 2018.

1680 By reason of the knowledge of Mr Hunter and Mr Macdonald, GetSwift had knowledge of the Johnny Rockets Termination Information on and from 9 January 2018.

General availability

1681 In the absence of GetSwift addressing whether the Johnny Rockets Termination Information was generally available, I am satisfied, in the light of my discussion above (see [1143]), that the Johnny Rockets Termination Information was not generally available. My reasons parallel those in respect of the Fruit Box Termination Information (see [1311]), given both were marked as price sensitive and concerned an agreement that was subsequently terminated.

[2361] HCS at [235].

Materiality

1682 GetSwift submits that the Johnny Rockets Termination Information was not material because ASIC has not demonstrated that the expected benefits of the Johnny Rockets Agreement were material.[2362] However, this is simply a repetition of its Absence of Quantifiable Benefits Contention. As I have already made clear, this argument must be rejected. For similar reasons as I expressed in respect of the Fruit Box Termination Information (see [1314]), which was similarly marked as price sensitive, I am satisfied that the Johnny Rockets Termination Information was material.

1683 GetSwift, Mr Hunter and Mr Macdonald admitted that GetSwift did not disclose the Johnny Rockets Termination Information to the ASX between 9 January 2018 and until the date of commencement of this proceeding.[2363]

Conclusion

1684 In the light of the above, I conclude that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Johnny Rockets Termination Information from 9 January 2018 until the commencement of this proceeding.

H.3.13 *Yum Restaurant Services Group, LLC*

1685 ASIC's case in respect of Yum concerns GetSwift, Mr Hunter, Mr Macdonald and Mr Eagle.

Yum MSA

1686 On 28 November 2017, GetSwift entered into the Yum MSA. Yum entered into the Yum MSA on its own behalf, and on behalf of certain affiliated companies (**Yum Affiliates**): see [893].

1687 On 29 November 2017, GetSwift requested that its shares be placed in a trading halt, which the ASX granted: see [899]–[900].

Yum Announcement

1688 Each of the defendants (apart from Mr Eagle) admits that on 1 December 2017, GetSwift submitted the Yum Announcement to the ASX, entitled "Yum! Brands and GetSwift Sign

[2362] GCS at [1058].
[2363] Defences at [213].

Multi Year Partnership", which, at the direction of Mr Macdonald, was marked as "price sensitive": see [905]–[907]. Each of the defendants admits that the Yum Announcement stated that: (a) GetSwift is pleased to announce that it has signed a global multiyear partnership with Yum! Brands; (b) Yum operates the brands of Taco Bell, KFC, Pizza Hut and Wingstreet worldwide; (c) in order to compete aggressively in this market Yum has partnered with GetSwift to provide its retail stores globally the ability to compete with their global counterparts when it comes to deliveries and logistics; (d) GetSwift estimates that more than 250,00,000 deliveries annually will benefit from its platform as a result of the partnership after implementation (**Yum Deliveries Projection**); and (e) initial deployment will commence in the Middle East and Asia Pacific, with more than 20 countries slated to be rolled out in the first and second phase, followed by a broader deployment thereafter (**Yum Rollout Projection**).[2364]

1689 Mr Hunter admitted that he contributed to the drafting of the Yum Announcement,[2365] and Mr Macdonald admitted that he directed and authorised the transmission of the Yum Announcement to the ASX.[2366] The documentary evidence further reveals that all three directors, including Mr Eagle, engaged in communications and drafted various versions of the Yum Announcement: see [896]–[912]. Finally, they each received Mr Macdonald's email on 1 December 2017, which asked Mr Banson to submit the attached copy of the Yum Announcement and mark it as price sensitive: see [905]. Accordingly, I am satisfied each of the directors had knowledge of the contents of the Yum Announcement and that it had been submitted to the ASX.

Yum MSA Information

Existence

1690 ASIC contends that, when the Yum Announcement was released to the market on 1 December 2017, the following circumstances existed: (a) the Yum MSA did not have a fixed term; (b) the Yum MSA allowed Yum and Yum Affiliates to terminate for any or no reason by giving 30 days' notice; (c) the services to be provided and the revenues to be derived under the Yum MSA were to be determined pursuant to Statements of Work (**SOW**) to be agreed between

[2364] Defences at [228]–[229].
[2365] Hunter Defence at [347(n)].
[2366] Macdonald Defence at [271(a)(vii)].

GetSwift, Yum and Yum Affiliates in the future; (d) no SOW had been issued under the Yum MSA by Yum or any Yum Affiliates; (e) the Yum MSA did not oblige Yum or any Yum Affiliate to issue any SOW, did not oblige Yum or any Yum Affiliate to use GetSwift's services or to make the deliveries using the GetSwift Platform, and did not oblige any Yum Affiliate to enter into any agreement with GetSwift; and (f) due to the terms of the Yum MSA, the number of deliveries the agreement may generate was not determinable (collectively, the **Yum MSA Information**).[2367]

1691 Factual circumstances (a) and (c)–(f) of the Yum MSA Information were not in dispute and were admitted by GetSwift, Mr Hunter, Mr Macdonald and Mr Eagle (noting that I have slightly renumbered the pleaded circumstances that appear in the 4FASOC at [230] for clarity).[2368]

1692 In respect of the factual circumstance (b), the relevant clause in the Yum MSA was cl 12.2(a), which dealt with termination. This clause stated:

> **At any time that there is no uncompleted [SOW] outstanding,** either Party may terminate this Agreement for or no reason upon 30 days advance written notice to the other. In such event, the terms of this Agreement will continue to apply to complete SOWs, to the extent that such terms by their nature reasonably would be expected to continue.[2369]

1693 Clause 12.2(b) was also relevant in respect of a SOW:

> Yum may terminate for convenience any SOW by providing Supplier with **at least ten (10) days written notice (the "Cancellation Notice")**.[2370]

1694 In the light of these provisions, ASIC plead that cl 12 of the Yum MSA allowed Yum and Yum Affiliates to terminate for any or no reason by giving 30 days' notice.[2371] GetSwift argues that the correct interpretation of cl 12.2(a) of the MSA is that the right to terminate for any or no reason by giving 30 days' notice could only be exercised if there was "no uncompleted SOW outstanding".[2372] Implicit in this argument is that if there was an uncompleted SOW, then an extra ten days' notice would be required.

[2367] 4FASOC at [230].
[2368] Defences at [230].
[2369] Yum Announcement (GSWASIC00028619) (emphasis added).
[2370] Yum Announcement (GSWASIC00028619) (emphasis added).
[2371] 4FASOC at [230(b)].
[2372] GCS at [1165].

1695 I accept GetSwift's interpretation. In my view, a plain reading of the terms of cl 12.2(a) confirms that factual circumstance (b) of the Yum MSA Information could only be factually correct if there was no uncompleted SOW outstanding. However, even if there was a SOW outstanding, cl 12.2(b) confirms that it too could be terminated by first providing at least ten days' written notice. In any event, I do not see how the distinction is of any moment.

Awareness

1696 Mr Hunter contends that factual circumstance (f) is in the nature of an opinion, not a statement of fact, and that it was not held by him.[2373] I have already explained why I find such a distinction to have limited utility but, in any event, I disagree. The number of deliveries the agreement between Yum and GetSwift may generate being indeterminable is an objective fact of which Mr Hunter was aware. That is because he was involved in the negotiations and preparation of the Yum MSA and knew its terms, including that successful rollout was dependent on SOWs being signed with individual affiliates: see [880]–[892].[2374]

1697 In relation to factual circumstances (c)–(e), Mr Macdonald submits that the "evidence is consistent with a reasonable expectation on his part that Yum franchisees would proceed to agree SOWs and use the GetSwift platform".[2375] While this submission appears to be directed to his awareness of the materiality of these elements, it is convenient to address this submission here, given that it requires me to make findings as to Mr Macdonald's awareness in relation to the Yum MSA Information. Specifically, Mr Macdonald highlights that the evidence tends to suggest that following the trial, Yum intended to roll out the GetSwift Platform to its franchisees pursuant to SOWs and that Mr Sinha considered GetSwift "should be able to achieve all [their] goals" as to the exclusive provision to Yum franchisees of delivery logics software: see [876]. However, Mr Macdonald's assertion as to his state of mind concerning these elements is unsupported by the evidence. Mr Macdonald had knowledge of the Yum MSA by reason of negotiating and preparing it: see [880]–[892]. He therefore knew that any work performed by GetSwift would be subject to a SOW and, indeed, that even the trials to be conducted in two test markets would be subject to SOWs. It is unrealistic to give unqualified

[2373] HCS at [252].
[2374] ASIC Reply at [386].
[2375] MCS at [541].

weight to an unsubstantiated "expectation" that Yum franchisees would proceed with SOWs.[2376] Hence, at the time of the Yum Announcement, and given his involvement with Yum, I am satisfied that Mr Macdonald was aware of factual circumstances (c)–(e), in particular, that no SOW had been issued, and not a single delivery had been made.

1698 Mr Eagle contends that his state of knowledge was that the roll out of SOWs was imminent.[2377] Again, that is not to the point. As discussed in further detail below [1727], it can be concluded that Mr Eagle had knowledge that no SOW had been issued under the Yum MSA by Yum or any Yum Affiliate as at 1 December 2017.

1699 Besides these submissions, what the documentary evidence reveals is that between August and October 2017, Mr Hunter and Mr Macdonald were thoroughly involved in the negotiations of the Yum MSA and in preparing the Yum MSA: see [880]–[892]. There is also evidence of Mr Eagle reviewing the draft MSA and providing his comments in mark-up, and corresponding with staff at Yum: see [882]–[884] and [887]–[892]. Accordingly, I am satisfied that each of the directors was aware of the Yum MSA Information (there is dispute as to their knowledge of the materiality of this information, but I will address these below at Part H.4.

1700 By reason of the knowledge of the directors, I am satisfied that GetSwift was aware of the Yum MSA Information on and from 1 December 2017.

General availability

1701 GetSwift admit that factual circumstance (a) of the Yum MSA Information was not generally available.[2378] However, GetSwift contends that parts of the Yum MSA Information (i.e. factual circumstance (c) and (e) of the Yum MSA Information, and relatedly (d) and (f) of the Yum MSA Information) could be deduced generally from the Prospectus, including that GetSwift was operating a pay-per-use business model and that GetSwift's customers could cease using the GetSwift platform and could terminate their relationship with GetSwift.[2379] Moreover, it says that the disclosure of information that was to the effect that SOWs had to be agreed

[2376] ASIC Reply at [389].
[2377] ECS at [389].
[2378] GCS at [1164].
[2379] GCS at [1166]–[1168].

between GetSwift, Yum and Yum Affiliates, that Yum and Yum Affiliates were not obliged to make deliveries or to issue SOWs, and that Yum Affiliates were not obliged to enter into any agreement with GetSwift, would not have materially altered or qualified what the market already knew about how GetSwift's business model would apply to the partnership with Yum.[2380]

1702 As to this contention, it is once again important to have regard to the evidence of Mr Younes and Mr Vogel, which is relevant in this regard. As discussed above (at [1133]–[1135]), in relation to the Yum Announcement and the Yum MSA Information (which was in different terms to the Agreement Information for those clients who had only signed the Term Sheets), Mr Younes accepted that the words "proof of concept", "trial period" and "pilot" were all periods in which the customer had an opportunity to customise the product, fix any problems, "cease using the product or to terminate their relationship with the vendor if they're not satisfied".[2381] Somewhat inconsistently, Mr Vogel's evidence was that he thought that, because the partnership had been announced to the market and contained such specificity in relation to the delivery estimate, "any trial by Yum! had been completed prior to the announcement", and that a commercial agreement between GetSwift and Yum was in place post trial phase: see [1174].

1703 In attempting to reconcile these perspectives, it is necessary to keep in mind the following: materiality is a question for the Court; the opinion evidence is of somewhat limited utility; and in any event, the surmise of one investor witness is in no way conclusive. Further, one must keep in mind what I said in relation to the line of cross-examination of Mr Younes; that is, it tended to elide two distinct concepts: (a) a client assessing and testing the suitability of a product where there is no binding obligation to pay and where the client can simply walk away from the relationship; and (b) a roll out and full implementation period in which there is an exclusive contract, where the client is bound to pay fees for using the product and where, although the client can still terminate, they cannot use an alternative supplier by reason of the exclusivity provisions: see [1135].[2382] The issue here is that the overall picture presented to the market was the *latter* of these concepts, when the reality of the situation was the *former*. While

[2380] GCS at [1167].
[2381] T787.1–10 (Day 11).
[2382] ACS at [1381].

Mr Younes' evidence may go some way in demonstrating that some investors may have been aware that following the signing of the Yum MSA there would be a process of on boarding, roll out, and integration, or that there would be trials or pilots, it does not overcome the overall picture that was presented to the market. This "picture" is consistent with Mr Vogel's evidence, who opined that it was the latter of these scenarios which characterised GetSwift's signing of the Yum MSA (that is, the uncertain trial period has been completed and there was some substance to the relationship): see [1174]. Taking the evidence as a whole, assessed against what was being presented in the Prospectus, the Agreement After Trial Representations, and the Quantifiable Benefits Announcements, I am not satisfied that factual circumstances (c) and (d) of the Yum MSA Information were generally available.

1704 No submissions have been made as to the general availability of the other factual circumstances. Nevertheless, they were not matters that were available from public sources or that would be deduced from the available sources.

1705 Accordingly, I am satisfied the Yum MSA Information was not generally available.

Materiality

1706 GetSwift's submissions as to materiality appear to proceed on the basis of its Perpetually on Trial and Terminable at Will Contentions, that is, the market knew that GetSwift operated a pay-per-use model and that customers could terminate their contracts at will.[2383] For the reasons that I have already made clear in rejecting the Perpetually on Trial Contention and Terminable at Will Contention, this argument should be rejected.

1707 The only other contention concerns the fact that the Yum Announcement was released to the market on the same day as the First and Second Amazon Announcements were made. GetSwift points to how news coverage primarily focussed on the First Amazon Announcement but did not mention anything about Yum.[2384] GetSwift contends that it is not possible to draw an accurate or reliable distinction between the impact on GetSwift's share price created by the Yum Announcement on 1 December 2017 and the impact on GetSwift's shares created by the

[2383] GCS at [1164]–[1165], and [1168].
[2384] GSW.0003.0003.0404 at 0520, 0548, 0553, and 0566–0569.

Amazon Announcements.[2385] Ultimately, this is simply a nuanced iteration of its Share Price Contention, which I have already discussed, and disposed of, above: see [1230]–[1256].

1708 The Yum MSA Information was material. The Yum Announcement, which was marked as "price sensitive", would clearly have engendered and reinforced investor expectations about the GetSwift Platform (consistent with the First and Second Quantifiable Announcements Representation), including that GetSwift had entered into a global multi-year partnership commencing in the Middle East and Asia Pacific before being rolled out more broadly. In this context, the Yum MSA Information would have provided important contextual and qualifying information, including that the realisation of the benefits under the Yum MSA by GetSwift were significantly less certain. This is because it would have revealed that any services and revenues associated with the Yum MSA were actually dependent on a variety of factors, such as the fact that the Yum MSA was determined by reference to SOWs, which had not yet been agreed (let alone issued) with Yum and Yum Affiliates, and the fact that the Yum MSA did not have a fixed term. Moreover, it would have revealed that Yum was not obliged to issue any SOW or use GetSwift's services as well as the fact that Yum could not compel the Yum affiliates to do so. Since the Yum MSA Information would have also highlighted that the number of deliveries that the Yum MSA would generate was not determinable, it would have cast significant doubt on the rollout projections contained within the Yum Announcement, which were not qualified to reflect the nature of the Yum MSA. In this sense, the Yum MSA Information, on an *ex ante* assessment, would have been important information that investors would have evaluated in determining the nature of the agreement, the benefits to be derived under it, and hence, whether to acquire or dispose of GetSwift's shares.

1709 GetSwift, Mr Hunter and Mr Macdonald admitted that GetSwift did not notify the ASX of the Yum MSA Information between 1 December 2017 and until the date of issue of this proceeding.[2386]

[2385] GCS at [1171]–[1172].
[2386] Defences at [233].

Conclusion

1710 For the above reasons, GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Yum MSA Information from 1 December 2017 until the date upon which this proceeding was commenced.

Yum Projection Information

Existence

1711 ASIC contends that, on 1 December 2017, when the Yum Announcement was released to the market, the following circumstances existed: (a) Yum was contemplating conducting proof of concept trials of the GetSwift Platform in two test markets although it had not yet determined the two markets in which to conduct the trials; (b) any adoption of the GetSwift Platform by Yum beyond the contemplated proof of concept trials was conditional on the successful completion of the proof of concept trials; (c) Yum was testing other service providers in various markets which offered services similar to GetSwift; (d) Yum did not give GetSwift the Yum Deliveries Projection; (e) Yum could not compel any Yum Affiliate to enter into any agreements including with GetSwift and use the GetSwift Platform; and (f) no SOW had been issued under the Yum MSA by Yum or any Yum Affiliate (collectively, the **Yum Projection Information**).

1712 Factual circumstances (d)–(f) were admitted.[2387] The disputes regarding factual circumstances (a)–(c) fall to be determined.

1713 To refute the existence of factual circumstance (a), GetSwift point to the following evidence:

(1) Mr Sinha stating that at the time Yum executed the MSA on 28 November 2017, he intended and expected that trials would take place in the Hong Kong and Kuwait markets (see [922]–[924]);

(2) Mr Sinha's email of 9 December 2017, in which he stated that he wanted to "get started on the HK and Kuwait test" (see [936]); and

(3) By 18 December 2017 and beyond, Mr Sinha was finalising the terms of proposed SOWs between GetSwift and the business units responsible for the Asia Pacific and

[2387] Defences at [231].

Middle East/North Africa markets, which provided for testing to take place in those markets (see [937]–[955]).

1714 From this evidence, GetSwift contends that by 1 December 2017, Yum had in fact settled upon Hong Kong and Kuwait as the two markets in which pilot testing would be conducted.[2388] Moreover, related to this submission, it is said that Mr Sinha's recollection regarding the conduct of pilot testing in Hong Kong, and in particular, his evidence that he did not recall Hong Kong "ever accepted that, yes, let's do a trial", is unreliable and of little weight (see [924]).[2389]

1715 I do not accept these contentions. Mr Sinha may have been seeking the agreement of his Hong Kong colleagues to conduct a trial in Hong Kong, but it is evident that he was having difficulty in securing a firm and final commitment, a fact he conveyed to Messrs Hunter and Macdonald: see [863]. This evidence is consistent with the factual circumstance (a); that is, that Yum had not yet "determined the two markets in which to conduct the trials." There was no firm decision; rather, the evidence shows that Mr Sinha assessed various test markets, with Pizza Hut Kuwait being the only market that eventually showed interest in conducting a pilot of the GetSwift's product: [861]–[867]. While it might have been Mr Sinha's *intention* that a trial of the GetSwift software would take place in the Hong Kong market, it cannot be said that Yum had determined the two markets in which to conduct the trials.

1716 In any event, as at the time of the Yum Announcement, there was no concluded agreement that the trials would, in fact, take place in Kuwait and Hong Kong: see [923]. This conclusion is corroborated by the fact that even after the Yum Announcement, no agreement had been reached for a trial to be conducted in Hong Kong: see [939]. As the evidence reveals, a draft SOW for the trials was still being discussed in late December 2017 and January 2018 and was never executed: see [937]–[955]. Ultimately, Mr Sinha's evidence makes it clear that Hong Kong was simply an aspirational market. Since the evidence only establishes that the Kuwait market was to be involved in the pilot of the GetSwift Platform, Yum had not yet determined

[2388] GCS at [1175].
[2389] GCS at [1142].

the two markets in which to conduct the trials on 1 December 2017. The evidence favours a finding that factual circumstance (a) existed.

1717 GetSwift does not appear to dispute the existence of factual circumstance (b), but takes issue with its generally availability and materiality, which I will discuss below.[2390] In any case, I accept, from the evidence of Mr Sinha, that any adoption of the GetSwift Platform by Yum beyond the contemplated proof of concept trials was conditional on the successful completion of the proof of concept trials: see [917]. This factual circumstance therefore existed.

1718 As to factual circumstance (c), GetSwift contends that ASIC has not established Yum was in fact testing software from other providers that were similar to the GetSwift Platform as at 1 December 2017.[2391] I disagree. As discussed at [864], Mr Sinha understood that Restaurant Brands New Zealand (an independently owned franchisee) had downloaded the GetSwift software, had considered a number of other service providers and had decided not to proceed with GetSwift. Moreover, Mr Sinha gave evidence that Pizza Hut franchisees in India were testing a product "similar to GetSwift" for around one cent per delivery: see [863]. This demonstrates that Yum was in fact testing other service providers that offered services similar to GetSwift.

1719 I am satisfied that Yum Projection Information existed.

Awareness

1720 Turning to the knowledge of each of the directors, it is noteworthy that Mr Hunter does not submit that he was not aware of the Yum Projection Information, and his contentions largely concern his knowledge as to the materiality of the Yum Projection Information, which I will address below.

1721 The Yum Information is tricky. While Messrs Hunter and Macdonald were involved in communications with Mr Sinha communicated to GetSwift that Hong Kong and India were not agreeing to undertake a pilot for various reasons (see [863]),[2392] the contemporaneous documents surrounding the date of the Announcement do point to a reasonable belief on the

[2390] GCS at [1177].
[2391] GCS at [1178].
[2392] T725.7–11 (Day 10); T725.34–37 (Day 10).

part of Messrs Hunter and Macdonald that the Kuwait and Hong Kong were the locked in test markets (see [922], [933]–[953]), although this is contradicted by Mr Sinha's evidence: see [922]–[924]. I have not reached the level of satisfaction required to conclude that, as at 1 December 2017, Messrs Hunter and Macdonald were aware of factual circumstance (a). Of course, that realisation must have dawned on them in the start of 2018, given the developments which occurred (see [955]), but pinpointing a date is difficult and ultimately, does not matter (given, as I will explain, the sting of the Yum Projection Information) is conveyed by the other factual circumstances.

1722 Mr Macdonald also puts in dispute his awareness of factual circumstance (d), asserting that ASIC has failed to establish he was aware of the fact that Yum did not give GetSwift the Yum Deliveries Projection, on the basis that he was not involved in the calculation of the projection of 250,000,000 deliveries per annum.[2393] But this is contrary to the weight of the evidence. Mr Macdonald and Mr Hunter, were involved in negotiations with Mr Sinha during August and September 2017: see [849]. While, in these negotiations, it appears that they considered possible volumes of transactions, costs and deliveries for each country in which GetSwift's services might be made available if the pilot tests were successfully completed, Mr Sinha told Mr Hunter and Mr Macdonald that he did not have data of deliveries that were requested of him: see [849]. In any event, the high level estimates that Mr Sinha provided were based on a number of qualified assumptions (such as approximately 800 to 1,000 transactions per week in the top 20 markets, 25% of those transactions were deliveries and 3,000 to 5,000 stories), which he conveyed to Messrs Hunter and Macdonald: see [849]. On any rational view, those high-level estimates were nowhere in the range of 250,000,000 deliveries per annum: see [849]. This conclusion is supported by the fact that it is highly implausible, in the context of Mr Macdonald's role in directing and authorising the transmission of the Yum Deliveries Projection, that he did not know that the Yum Deliveries Projection Information was based on qualified assumptions that were nowhere in the range of 250,000,000. However, in the end, the reasoning on this point is neither here nor there given I have not reached the level of satisfaction to conclude factual circumstance (d) was not generally available below: see [1738]–[1740].

[2393] MCS at [546].

1723 Otherwise, I am satisfied that Mr Hunter and Mr Macdonald had knowledge of the Yum Projection Information. The evidence reveals that Mr Hunter and Mr Macdonald were thoroughly involved in the negotiations and preparations of the Yum MSA (see [880]–[892]) as well as in the Initial Proposal (see [844]–[860]). From these matters, I am satisfied that each was aware of factual circumstances (b)–(e). Similarly, I find that Mr Hunter and Mr Macdonald knew no SOW had been issued under the Yum MSA by Yum or any Yum Affiliate (that is, factual circumstance (f)) because they continued to negotiate the SOW well after 1 December 2017: see [936]–[955].

1724 Noting that I will return to their detailed submissions on general availability and materiality at a later stage, I am satisfied that both Mr Hunter and Mr Macdonald had knowledge of the elements of the Yum Projection Information I have indicated from 1 December 2017.

1725 ASIC's case against Mr Eagle concerns factual circumstances (a), (b), (e) and (f) of the Yum Projection Information (**Eagle Yum Projection Information**). From the outset, I should note that Mr Eagle raises an overarching submission that he cannot be knowingly involved in a company's failure to disclose a set of information, if he only knew a subset of that information.[2394] For reasons that I have already expressed above (at [1637]) in relation to NA Williams, this submission should not be accepted. If I find Mr Eagle was aware of the Eagle Yum Projection Information and that this information, on its own, was material, then the contravention against him is made out.

1726 Turning to his knowledge, I accept Mr Eagle's contentions that he was not aware of factual circumstances (a) and (b). The particulars provided by ASIC do not reference communications to which Mr Eagle was a party and these matters were operational matters which Mr Eagle, in the light of the evidence, had no direct involvement.[2395]

1727 However, I am satisfied that Mr Eagle had knowledge of factual circumstance (e), by reason of him receiving an email from Mr Macdonald on 25 October 2017, which forwarded an email from Mr Sinha, stating (see [880]–[882]):

> Please find the MSA attached. This is an MSA which is aligned and agreed with all

[2394] ECS at [383]–[384].
[2395] ECS at [387].

> brands any changes to this would mean, in future, if you were to partner with our other brands you would have to start at this point again for that individual brand. However, if there are no changes then you could use this overarching MSA with Yum with all brands.[2396]

1728 Following this email, Mr Eagle was involved in the negotiations and preparation of the Yum MSA and knew its terms: see [880]–[892].[2397] On the basis of the Mr Macdonald forwarding Mr Sinha's email to Mr Eagle, and Mr Eagle's involvement in the drafting of the Yum MSA, I am satisfied that Mr Eagle knew that Yum could not compel any Yum Affiliate to enter into an agreement with GetSwift or use the GetSwift Platform.

1729 Moreover, in respect of factual circumstance (f), I am satisfied that Mr Eagle knew that no SOW under the Yum MSA could be issued by Yum or any Yum Affiliate prior to execution of the Yum MSA information. This is because Mr Eagle received the executed copy of the Yum MSA (see [898]) and subsequently emailed Ms Adams (of Yum) on 29 November 2017 stating, "[t]hanks for your partnership! I have reminded our team to begin working on the SOWs" (see [894]). Mr Eagle therefore knew that no SOW had been issued under the Yum MSA by Yum or any Yum Affiliate 29 November 2017, which is two days before ASIC alleges GetSwift became aware of the Yum Projection Information. No further SOW was signed and there is no evidence to indicate that Mr Eagle later became "aware" that a SOW had been signed. Accordingly, I am satisfied that Mr Eagle was aware of factual circumstances (e) and (f) of the Eagle Yum Projection Information.

1730 By reason of the knowledge of Mr Hunter, Mr Macdonald and (to an extent) Mr Eagle, I am satisfied that GetSwift had knowledge of Yum Projection Information (absent factual circumstance (a)) on and from 1 December 2017.

General availability

1731 GetSwift advance a number of submissions as to the general availability of the Yum Projection Information.

1732 *First*, although addressed in the context of materiality, GetSwift's contentions concerning factual circumstance (b) of the Yum Projection Information appear to proceed on the premise

[2396] GSWASIC00006020; GSWASIC00005974.
[2397] ASIC Reply at [386].

that it was generally available, and as such, it is appropriate to discuss those contentions here.[2398] GetSwift says that what is asserted by factual circumstance (b) was not materially different from what was in fact disclosed to the market by the Yum Announcement. The relevant part of the Yum Announcement stated:

> The Company estimates that more than 250,000,000 deliveries annually will benefit from its platform as a result of this partnership after implementation. Initial deployments will commence in the Middle East, and Asia Pac, with more than 20 countries slated to be rolled out in the first and second phase, followed by a broader deployment thereafter.[2399]

1733 It is said that what this indicated to the market was the fact that there would be a limited roll out in the initial two markets for GetSwift's Platform, which would involve testing of the platform, and that the broader deployment would be dependent on that limited roll out being successful. Further, it says that the fact that broader deployment would depend on the success of the roll out period follows from information in the Prospectus that GetSwift operated a pay-per-use model and that customers could terminate at will. GetSwift also relies on the fact that this was how Mr Younes understood the Yum Announcement, and that it should be inferred other investors in the market would have shared this understanding: see [1133].[2400]

1734 There are a number of deficiencies in GetSwift's argument, the most obvious being that the use of the word "will" in the announcement indicates a positive assertion as to what would occur.[2401] In this sense, the Yum Announcement stated that: (a) what would occur would be a *deployment* (not a *trial*); and (b) what would then occur would be a *roll out*. The true position, however, was that what was to occur in the test markets (once agreed) was a *trial*, not a *deployment* or *roll out*, and that there was no concluded agreement that Kuwait and Hong Kong would, in fact, be the two markets: see [922]. As such, the true position was that the present *hope* was that a trial would be conducted in Kuwait and Hong Kong with formal SOWs not yet agreed for such trials to take place; (b) if such trials were successful, then it was *hoped* that GetSwift would be able to use its advantage of having entered into an MSA to seek to enter into SOWs with other franchisees, affiliates or brands; and (c) if they were successful, then

[2398] GCS at [1177].
[2399] Yum Announcement (GSW.1001.0001.0318) (emphasis added).
[2400] GCS at [1177].
[2401] ASIC Reply at [377].

GetSwift was hopeful of generating revenue from the SOWs that had *actually* been finalised. None of this was disclosed which it would have provided a significant qualification to the Yum Deliveries Projection.[2402]

1735 Moreover, even though Mr Younes might have understood that a customer could cease using the platform at any time throughout the initial period of testing and pilot (see [1133]), he was not confronted with any of the above propositions. Further, the topic was not pursued with Mr Vogel, Ms Howitt or Mr Hall. In any case, for the reasons outlined in respect to the Yum MSA Information on the same issue (see [1703]), even in the light of Mr Younes' evidence, I am satisfied that factual circumstance (b) of the Yum MSA Information was not generally available.

1736 *Secondly*, GetSwift contends that factual circumstance (c) of the Yum Projection Information was generally available from the Prospectus, which stated that GetSwift was operating in a competitive market in which rivals were offering similar products.[2403] Indeed, the Prospectus stated the following under the heading "Specific Risks":

> **6.2.4 Competition and new technologies**
>
> The industries in which the Company operates are subject to increasing domestic and global competition and are fast-paced and constantly changing. The Company will have no influence or control over the activities or actions of its competitors and other industry participants, whose activities or actions may positively or negatively affect the operating and financial performance of the Company. Competitors may have significant additional experience and/or resources to develop competing products and services, which may adversely affect the Company's business, financial position, results of operations, cash flows and prospects. For example, new third-party technologies could prove more advanced or beneficial than the Company's, which could adversely affect the Company's revenue potential.[2404]

1737 While it is true that this statement in the Prospectus could give rise to the belief that clients could be testing other service provides which offer similar services to GetSwift, this was a broad statement released in the Prospectus with no reference to Yum and must be read in context, including, importantly, what GetSwift had said about continuous disclosure. In any event, I am not satisfied that the market would have discerned that Yum itself was testing other service providers, given the absence of specificity in the statements relied upon and the specific

[2402] ASIC Reply at [378].
[2403] Prospectus (GSW.1001.0001.0478) at 0522 [6.2.4]; GSC at [1178].
[2404] Prospectus (GSW.1001.0001.0478) at 0522 [6.2.4]; GSC at [1178].

reference in the Yum Announcement to estimates that more than 250,000,000 deliveries annually will benefit from its platform as a result of this partnership after implementation.

1738 *Thirdly*, GetSwift submits factual circumstance (d) was generally available given that the Yum Announcement expressly stated that the deliveries estimate was made by "The Company", which it takes to mean GetSwift.[2405] The relevant part of the announcement was in the following terms:

> Yum! Brands and GetSwift Sign Multi Year Partnership
>
> GetSwift Limited (ASX: GSW) ('GetSwift' or the 'Company'), the SaaS solution company that optimises delivery logistics worldwide, is pleased to announce that it has signed an global multiyear partnership with Yum! brands ("Yum!"). Yum! is a Fortune 500 corporation and operates the brands of Taco Bell, KFC, Pizza Hut, and WingStreet worldwide.
>
> …
>
> **The Company estimates that more than 250,000,000 deliveries annually will** benefit from its platform as a result of this partnership after implementation. Initial deployments will commence in the Middle East, and Asia Pac, with more than 20 countries slated to be rolled out in the first and second phase, followed by a broader deployment thereafter. The company will be focused on concurrent multi regional rollouts to speed up global coverage.[2406]

1739 This point has caused me some pause. In the announcement, GetSwift is clearly defined as the "Company" in the first line, meaning that the second paragraph extracted above, on an ordinary reading, states "[GetSwift] estimates that more than 250,000,000 deliveries annually". However, the question is whether that automatically translates into a finding that Yum did not give GetSwift the Yum Deliveries Projection and this information was generally available? I do not think it is that simple. In support of its contention that this factual circumstance was not generally available, ASIC points to Mr Vogel's evidence that:

> [He] viewed the estimate of a specific number of annual deliveries referred to in the Yum! Announcement (being 250,000,000 deliveries annually) as being significant and assumed that there was **rigor [*sic*] around that number**. While [he] did not expect the partnership to be fully integrated from day one, [he] did assume that the reasonably precise figure of 250,000,000 estimated annual deliveries would be captured once the software was fully integrated. At this time, [he] assumed **because the partnership had been announced to the market and contained such specificity in relation to the delivery estimate, that there was a commercial agreement between GetSwift**

[2405] GCS at [1179].
[2406] Yum Announcement (GSW.1001.0001.0318) (emphasis altered).

and Yum! Brand that was in place post trial phase.[2407]

1740 Mr Vogel's evidence demonstrates that a reasonable investor may have viewed the Yum Deliveries Projection as having rigour and that this figure was likely a product of GetSwift's discussions with Yum. However, the bottom line is that the Yum Announcement expressly stated that the deliveries estimate was attributable to GetSwift. Indeed, while one might speculate as to how that figure was arrived at, there is no reference to Yum's involvement in the Yum Deliveries Projection. I therefore have not reached the level of satisfaction required to conclude that factual circumstance (d) – Yum did not give GetSwift the Yum Deliveries Projection – was not generally available.

1741 No submissions have been advanced as to the general availability of the other factual circumstances and I am satisfied that, given they were not disclosed in the Yum Announcement or capable of being deduced from any public source, these factual circumstances were not generally available.

Materiality

1742 GetSwift advances a number of arguments as to why the Yum Projection Information was not material. *First*, GetSwift contends that factual circumstance (a) was not material because Yum was "plainly intent" on conducting trials as the first step in a wider deployment across its global brands. It is said that the precise locations of the two deployment markets were details that would have no material bearing on investors' views of the partnership or the value of GetSwift's shares.[2408] *Secondly*, GetSwift submits that factual circumstance (b) was not material because it was not materially different from what was in fact disclosed to the market by the Yum Announcement.[2409] *Thirdly*, in respect of factual circumstance (c), it is said that the mere fact that Yum was looking at other software providers could not have had a material effect on the price or value of GetSwift's shares.[2410] *Fourthly*, in respect of factual circumstances (e) and (f), GetSwift submits that there is an overlap with factual circumstance (b) and that this information is not material for the same reasons.[2411]

[2407] Vogel Affidavit (GSW.0009.0013.0001_R) at [30]; ACS at [1416] (emphasis added).
[2408] GCS at [1176].
[2409] GCS at [1177].
[2410] GCS at [1178].
[2411] GCS at [1180].

1743 It is necessary for me to deal briefly of each of these arguments. The *first*, *second* and *fourth* contentions do not require elaboration for the reasons that I provided above (see [1734]–[1735]), which demonstrate why the disclosure of these elements would have provided a significant qualification to the Yum Deliveries Projection. As to its *third* contention, I accept the fact that Yum was testing other service providers qualified the expectations as announced by the Yum Announcement and was therefore important contextual and qualifying information.

1744 The Yum Projection Information was material. The Yum Announcement was marked as "price sensitive", contained specific projections as to deliveries and projections, and stated that GetSwift had entered into a global multi-year partnership commencing in the Middle East and Asia Pacific before being rolled out more broadly. Within this context, the Yum Projection Information would have significantly qualified the stated expectations concerning the benefits by any adoption of the GetSwift Platform by Yum beyond the contemplated proof of concept trials was conditional on the successful completion of the proof of concept trials and Yum was also testing other service providers that offered services similar to GetSwift. In this sense, the Yum Projection Information would have indicated to investors that the prospects of future roll outs and implementation were heavily qualified, and this would impact investors' assessments as to whether there was any realistic prospect that the large number of deliveries projected in the Yum Announcement could be achieved. It would have revealed that the true position was significantly less certain than the Yum Announcement made it out to be. I note for completeness that I have reached this conclusion despite the fact I did not reach the level of satisfaction to conclude factual circumstance (d) was not generally available.

1745 GetSwift, Mr Hunter and Mr Macdonald admitted that between 1 December 2017 and until the date of issue of this proceeding, GetSwift did not notify the ASX of the Yum MSA Information.[2412]

Conclusion

1746 I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Yum Projection Information from 1 December 2017 until the commencement of this proceeding.

[2412] Defences at [233].

H.3.14 *Amazon Corporate LLC*

1747 ASIC's case in respect of Amazon is between 10:01am and 6:15pm on 1 December 2017 and concerns GetSwift, Mr Hunter, Mr Macdonald and Mr Eagle.

Amazon MSA

1748 On or about 30 November 2017, GetSwift and Amazon entered into the Amazon MSA: see [984].

First Amazon Announcement

1749 Each of the defendants (apart from Mr Eagle) admits that on 1 December 2017, GetSwift submitted the First Amazon Announcement to the ASX entitled "GetSwift Signs Global Agreement with Amazon",[2413] which was marked as "price sensitive": see [996]–[998]. Each of the defendants admits that the First Amazon Announcement stated: (a) GetSwift signed a global agreement with Amazon; and (b) due to the terms and conditions of the agreement and its high sensitive nature, no further information would be provided by GetSwift, other than to comply with regulatory requirements for disclosure.[2414]

1750 Mr Hunter admitted that he contributed to the drafting of the First Amazon Announcement,[2415] and Mr Macdonald admitted that he directed and authorised the transmission of the First Amazon Announcement to the ASX.[2416] Mr Macdonald and Mr Eagle also received an email from Mr Hunter on 30 November 2017 attaching a draft copy of the ASX announcement concerning GetSwift's entry into the Amazon MSA, which stated "please review and comment": see [994]. Moreover, the day after, Mr Macdonald sent an email to Mr Banson (copied to Mr Eagle and Mr Hunter) in which Mr Macdonald attached a copy of the First Amazon Announcement and the Yum Announcement, and stated that the two attachments were to be released and marked as price sensitive, to which Mr Banson replied stating that he will release at 9:30am "as just discussed with Brett": see [996]–[997]. Finally, Mr Hunter, Mr Macdonald and Mr Eagle received email confirmation from Mr Banson that the Yum Announcement had been released by the ASX and marked as "price sensitive": see [1001].

[2413] Defences at [248].
[2414] Defences at [248]–[249].
[2415] Hunter Defence at [347(p)].
[2416] Macdonald Defence at [271(a)(ix)].

Accordingly, I am satisfied that each of the directors had knowledge that GetSwift had submitted the First Amazon Announcement to the ASX and was aware of its contents.

Second Amazon Announcement

1751 As noted in the factual narrative above, following the First Amazon Announcement, the ASX suspended GetSwift's shares from trading: see [1005]. Each of the defendants admits that at 6:15pm on 1 December 2017, GetSwift submitted the Second Amazon Announcement to the ASX entitled "GetSwift – Update on Amazon".[2417] At 6:32pm, GetSwift shares were reinstated to official quotation.[2418] At 6:54pm, Mr Banson sent an email to Messrs Eagle, Macdonald and Hunter informing them that the Second Amazon Announcement had been released: see [1016]. I am satisfied that each of the directors had knowledge that GetSwift had submitted the Second Amazon Announcement to the ASX.

1752 The Second Amazon Announcement stated that: (a) GetSwift had signed a global master services agreement with Amazon; (b) the extent of the services to be provided and the revenues to be derived under the Amazon MSA would be generated from specific transactions (**Service Orders**) agreed with Amazon pursuant to the Master Services Agreement; (c) the Amazon MSA did not oblige Amazon to agree any Service Order with GetSwift; (d) Amazon had not agreed any Service Order with GetSwift under the Amazon MSA; (e) the Amazon MSA did not oblige Amazon to use GetSwift's services or to make deliveries using the GetSwift Platform; and (f) due to the terms of the agreement the number of deliveries the agreement may generate was currently not determinable.[2419]

1753 Mr Eagle was primarily responsible for drafting and coordinating the Second Amazon Announcement. At 5:32pm on 1 December 2017, he sent an email to Mr Black, Mr Kabega and Mr Lewis (all from the ASX) which attached a draft of the announcement: see [1011]. Mr Eagle also forwarded this email to Mr Hunter and Mr Macdonald: see [1011]. Following a further revised draft of the announcement, at 6:02pm, Mr Black approved the announcement for submission via ASX online: see [1013]. Apart from attending the meeting with the ASX on

[2417] Defences at [251].
[2418] Agreed Background Facts (GSW.0002.0002.0001) at [97].
[2419] Defences at [252].

1 December 2017 (see [1009]), I accept Mr Hunter's submission that he did not have any involvement in the preparation of the Second Amazon Announcement,[2420] and Mr Macdonald's submission that there is no evidence that the Second Amazon Announcement was sent to him for his review or approval prior to its release or that he contributed to the drafting, approval or release of the Second Amazon Announcement.[2421] But consistent with my reasoning that directors of a publicly listed company would, at the very least, review the final announcement that had been released to the ASX, I am satisfied they were aware of the contents of the announcement: see [1276]. This conclusion is particularly compelling in a context where a company had its shares suspended and this was the announcement to resume trading.

Amazon MSA Information

Existence

1754 It was common ground that, at the time of the First Amazon Announcement on 1 December 2017, the following factual circumstances existed: (a) GetSwift had signed a global master services agreement with Amazon; (b) the extent of the services to be provided and the revenues to be derived under the Amazon MSA were to be generated from specific transactions (**Service Orders**), to be agreed with Amazon pursuant to the Amazon MSA; (c) the Amazon MSA did not oblige Amazon to agree any Service Order with GetSwift; (d) Amazon had not agreed any Service Order with GetSwift under the Amazon MSA; (e) the Amazon MSA did not oblige Amazon to use GetSwift's services or to make deliveries using the GetSwift Platform; (f) due to the terms of the Amazon MSA, the number of deliveries the agreement may generate was not determinable; and (g) the Amazon MSA allowed Amazon to terminate for any or no reason by giving 30 days' notice (collectively, the **Amazon MSA Information**).[2422]

Awareness

1755 No submissions have been advanced by the directors disputing their awareness of the Amazon MSA Information. Nonetheless, I am satisfied, by reason of their involvement in the negotiations of the Amazon MSA (see [960]–[988]) and the fact that Mr Hunter forwarded to Mr Eagle and Mr Macdonald a copy of the Amazon MSA (see [993]) that each was aware of

[2420] HCS at [268].
[2421] MCS at [568], [578]–[579].
[2422] Defences at [254].

the Amazon MSA Information from 1 December 2017, and that by reason of their knowledge, so too was GetSwift.

General availability

1756 From the outset, there are a number of threshold points that GetSwift raise that are necessary to address before I engage in a discussion of the general availability and materiality of the Amazon MSA Information.

1757 *First*, GetSwift contends that, because ASIC limited the contravention involving the "Amazon MSA Information" to an 8.25 hour period which concluded when the Second Amazon Announcement was made, ASIC implicitly accepts that the Second Amazon Announcement was sufficient to discharge any continuous disclosure obligations.[2423] This is incorrect; although, it ultimately does not matter. The fact is, only some elements of the Amazon MSA Information were disclosed in the Second Amazon Announcement.[2424] It does not follow that by confining the Amazon MSA Information continuous disclosure contravention to the period between the release of the First Amazon Announcement and the release of the Second Amazon Announcement, ASIC has accepted that the Amazon MSA Information was disclosed in the Second Amazon Announcement.

1758 *Secondly*, GetSwift contends that it is "utterly bizarre" that ASIC would invoke the Agreement After Trial Representations as part of its materiality case in relation to the Amazon MSA Information. GetSwift says that this is because, before entry into the Amazon MSA, the GetSwift platform was subject to a trial by Amazon under the Trial Hosted Services Agreement.[2425] This argument must also be rejected. The First Amazon Announcement stated that GetSwift had entered into an "agreement" with Amazon. This suggests that Amazon was an Enterprise Client, to which the First Agreement After Trial Representation would apply. Moreover, consistent with the findings made above, the GetSwift Platform was not subject to a trial by Amazon before entry into the Amazon MSA: see [989]–[991]. Therefore GetSwift proceeds on a false premise in asserting that the GetSwift Platform had already been subjected to a trial.

[2423] GCS at [1247], and [1260].
[2424] ASIC Reply at [408].
[2425] GCS at [1261].

1759 In addition, GetSwift advance a number of specific arguments as to the general availability of the Amazon MSA Information. It is necessary to deal with each of these contentions in turn.

1760 *First*, I accept GetSwift's contention that factual circumstance (a), that "GetSwift had signed a global master services agreement with Amazon", was generally available, given the First Amazon Announcement stated that GetSwift had signed a global agreement with Amazon: see [998]. Moreover, I accept GetSwift's contention that, for present purposes, the supposed difference between announcing the entry into a "global agreement" and a "global master services agreement" is elusive.[2426]

1761 *Secondly*, each of factual circumstances (b)–(d) concerns the fact that services were to be provided under a Service Order. GetSwift contends that each of these circumstances could not have been material information that was not generally available, given that it was true for all of the Enterprise Clients that the services to be provided and revenue derived from a given customer were to be generated from specific transactions. In the context of Amazon, the revenue generated from specific transactions was to be derived from Service Orders to be agreed with Amazon, where there was no obligation on Amazon to agree to any Service Order and Amazon had not agreed to any Service Order at the time.[2427] It says that this was a feature of its pay-per-use business model and that the use of a Service Orders adds nothing to these generally known matters.[2428] In essence, this appears to be a nuanced form of its Perpetually on Trial and Terminable at Will Contention, being that because GetSwift operated a pay-per-use business model, GetSwift was perpetually on trial. For the reasons that I have already explained, I am not satisfied that such information was generally available when considered in the light of the contents of the Prospectus, Agreement After Trial Representations and Quantifiable Announcements Representations.

1762 Factual circumstance (e) and (f) concern the fact that the Amazon MSA did not oblige Amazon to use GetSwift's services platform or make any deliveries using the GetSwift Platform and that the number of deliveries the agreement may generate was not determinable.[2429] GetSwift

[2426] GCS at [1252].
[2427] GCS at [1253].
[2428] GCS at [1254].
[2429] GCS at [1258].

submits that the "flipside" of these matters was that market participants must have been of the view that Amazon had some kind of provisions which obliged the use of the GetSwift platform with a pre-determined number of deliveries. It says that this is a hypothesis that is not made out, and is flawed, in the light of the generally available information concerning GetSwift's business model.[2430] I reject this submission, which again to me appears to be a particular manifestation of GetSwift's Perpetually on Trial and Terminable at Will Contention. The fact is the Second Amazon Announcement was released after the Agreement After Trial Representations and Quantifiable Announcements Representations, which, as an important matter of context, gave a measure of reliability to the nature of the deals that GetSwift was entering. It is unrealistic for GetSwift to submit that, in reality, and in the light of the information that had been fed to the market, the signing of the Amazon MSA might in fact yield no deliveries.

1763 Factual circumstance (g) mirrors previous arguments that have been advanced by GetSwift. Besides hammering its Terminable at Will Contention, which I have rejected, GetSwift submits that it must be recognised that all commercial contracts contain termination rights, but it is "obviously" not the general expectation that, upon entering a contract, those rights will be exercised in the short term. GetSwift says that expectations of the potential of a partnership are not sensibly based on such a hypothesis.[2431] This is not to the point. The specific and known information regarding the right of termination in respect of the Yum MSA was not generally available.

1764 Finally, to the extent Mr Younes evidence might be viewed as relevant to the question of general availability, I would echo my comments made in respect of NA Williams above: see [1648]–[1649].

[2430] GCS at [1258].
[2431] GCS at [1259].

Materiality

1765 GetSwift advances three primary arguments as to why the Amazon MSA Information should not be viewed as material (noting I have not addressed factual circumstance (a) of the Amazon MSA Information in the light of my finding that it was generally available).

1766 *First*, as a starting point, GetSwift contends that the simple terms and substance of the First Amazon Announcement should tell against the need to make qualifying disclosures in the sense that there was nothing of substance to qualify.[2432]

1767 *Secondly*, GetSwift submits that the need for a Service Order in the Amazon MSA Information was completely acontextual (as opposed to being "contextual" or material information) because there was every reason to believe that a Service Order would be executed promptly.[2433] It drew upon the following facts:

(1) Amazon initiated contacted with GetSwift about the use of its platform: see [957].

(2) The GetSwift Platform had been subject to a security review process by Amazon (which it passed): see [967], [969]–[970], [1029].

(3) Ms Hardin was eager to progress towards the implementation of the pilot and stated that her intent was to start the pilot soon after security was completed: see [1007].

(4) The parties had gone to the trouble of negotiating the Amazon MSA, which would have been a waste of time if Amazon was not fully expecting to execute a service order.

(5) Ms Hardin had expressed enthusiasm, excitement and eagerness about using the GetSwift Platform: see, e.g., [965], [967], [969], [987], [1030]–[1031].

(6) The first intimation that a service order would not be executed was in late January or early February 2018: see [1032].

(7) The process of preparing a service order continued to cooperatively progress at the time of entry into the Amazon MSA.[2434]

[2432] GCS at [1250].
[2433] GCS at [1255]–[1257].
[2434] T754.1–12 (Day 11).

1768 *Thirdly*, GetSwift contends that nothing should be read into the significant increase in share price.[2435] The evidence is that GetSwift's share price closed at $1.96 the day before the First Amazon Announcement. At 10:50am on the day of the First Amazon Announcement, it closed at $3.60 (representing an 84% increase after only 9 minutes of trading before it was suspended). The next trading day, it closed at $4.30 (representing an increase of 119% on the 29 November close). On the following day, it had fallen to $3.70.[2436] Flowing from this analysis, GetSwift says that after the Second Amazon Announcement, the market did not react negatively and, to the contrary, the share price continued to increase above the closing price at the time of suspension on 1 December 2017.[2437]

1769 Each of these contentions does not withstand scrutiny.

1770 As to its *first* contention, in circumstances where "Amazon was expecting to grow rapidly in Australia" and was "widely known as the world's largest online marketplace",[2438] it is a matter of common sense that any omitted material qualifying the terms of the Amazon MSA would be information that could be reasonably expected to influence the decision of whether an investor acquired or disposed of shares in GetSwift.[2439]

1771 The problem with GetSwift's *second* contention is that it selectively characterises Ms Hardin's evidence. Ms Hardin's evidence was that at the time of entry into the Amazon MSA, the Service Order "had not been fully negotiated" and that, on 19 December 2017, Ms Hardin and questioned why a disclosure would be required given that the Service Order had not been fully negotiated and the expected value of the Service Order was not material: see [984] and [1028]. [2440] Indeed, during cross-examination, she explained that issues concerning "components around pricing and timelines", and "articulation of Amazon's precise requirements in relation to its potential use" of the GetSwift Platform, needed to be addressed before Service Orders were executed and the pilot could commence: see [986]. Ms Hardin also gave evidence of other issues which existed, namely that GetSwift's pricing model did not align with Amazon's due to the low volume of deliveries to be made during the pilot, and that

[2435] GCS at [1262]–[1264].
[2436] GSW.0003.0005.0325 at 5.
[2437] GCS at [1263].
[2438] GCS at [1249].
[2439] ASIC Reply at [407].
[2440] Hardin Affidavit (GSW.0009.0027.0001_R) at [40].

Amazon required customisation work to be completed: see [986]. Considering Ms Hardin's evidence as a whole, which I accept, I am satisfied that information about the Service Order was contextual information, which qualified the true status of the Amazon MSA and was, therefore, material.

1772 As to GetSwift's *third* submission, it is important to recall the first threshold point (see [1757]) that ASIC should not be taken to have accepted that the Amazon MSA Information was disclosed fully in the Second Amazon Announcement.[2441] Therefore, the analysis of the share price in the manner contended for by GetSwift proceeds on a false premise, given that only some of the Amazon MSA Information was disclosed. GetSwift's submission also ignores the fact that the Yum Announcement was made at a time proximate to the First Amazon Announcement, which may have influenced GetSwift's share price. In any event, for the reasons that are outlined above (at [1230]–[1256]), the share price is not a determinative factor to assess the materiality of omitted information.

1773 Having dealt with each of GetSwift's specific contentions as to materiality, I note I am satisfied that the Amazon MSA Information was material. Although the First Amazon Announcement was short, it revealed to investors that GetSwift had entered into an agreement with one of the largest multi-national companies in the world. Within this context, the Amazon MSA Information would have been important contextual information that would have revealed the true status of the Amazon MSA, including indicating to investors that the realisation of the benefits expected from the Amazon MSA were significantly less certain, particularly since the Amazon MSA did not oblige Amazon to use GetSwift's services, while also allowing Amazon to terminate by giving 30 days' notice. Further, it would have highlighted that the size of the benefit was relatively small, given the revenues to be derived were yet to be agreed with Amazon. As such, I am satisfied that the qualifications contained within the Amazon MSA Information would reasonably be expected to have influenced investors in determining whether to acquire or dispose of shares in GetSwift.

[2441] ASIC Reply at [408].

1774 GetSwift, Mr Hunter and Mr Macdonald admit that GetSwift did not notify the ASX of the Amazon MSA Information between 10:01am and 6:15pm on 1 December 2017.[2442]

Conclusion

1775 Having established the four necessary elements of a continuous disclosure claim in respect of the Amazon MSA Information (absent factual circumstance (a)), I am satisfied that GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Amazon MSA Information (absent factual circumstance (a)) during the period from 10:01am on 1 December 2017 until 6:15pm on 1 December 2017.

H.2.15 *Second Placement*

Second Placement Trading Halt / Completion Announcement

1776 Each of the defendants (apart from Mr Eagle) admits that on 7 December 2017, GetSwift submitted to the ASX, and the ASX subsequently released to the market, the Second Placement Trading Halt Announcement: see [1038].[2443] Moreover, each of the defendants (apart from Mr Eagle) also admits that the Second Placement Trading Halt Announcement stated that GetSwift "requests a trading halt in relation to a proposed capital raising".[2444] In any event, the documentary evidence reveals that Mr Hunter, Mr Macdonald and Mr Eagle received email confirmation from Mr Banson that "GetSwift has been granted a trading halt": see [1040].

1777 While the Second Placement Trading Halt Announcement appears to have been prepared by Mr Banson (see [1034]–[1040]), the evidence reveals that Mr Banson sent an email to Mr Hunter, Mr Macdonald and Mr Eagle attaching a draft trading halt for their "review and approval": see [1034]. On this basis, it can be readily inferred that each of the directors had knowledge of its contents.

Second Placement Cleansing Notice

1778 On 22 December 2017, GetSwift submitted to the ASX, and the ASX released, the Second Placement Cleansing Notice: see [1053].

[2442] Defences at [256].
[2443] Defences at [264AA].
[2444] Defences at [264BB].

1779 As to the directors' involvement in the Second Placement Cleansing Notice, the documentary record reveals that Mr Eagle directed Mr Banson by email on 11 December 2017 to prepare an Appendix 3B and cleansing notice: see [1050]. Mr Banson responded to Mr Eagle attaching a draft Appendix 3B and cleansing notice. Of relevance, Mr Banson asked: "will you distribute to the board?": see [1051]. Mr Eagle subsequently sent an email to Mr Hunter and Mr Macdonald attaching a draft Appendix 3B and cleansing notice for their review: see [1052]. It can be readily inferred that each of the directors was aware of the Second Placement Cleansing Notice thereafter as the Second Placement Cleansing Notice was subsequently submitted to the ASX: see [1053]. Hence, I am satisfied that each of the directors had knowledge of the contents of the Second Placement Cleansing Notice, that it had been submitted to the ASX.

Second Placement Information

1780 ASIC's case concerning the Second Placement Information concerns GetSwift, Mr Hunter and Mr Macdonald.

Existence

1781 While Mr Macdonald and Mr Eagle asserted their privilege against exposure to penalties, GetSwift and Mr Hunter admitted that on 7 December 2017, GetSwift had not notified the ASX of the following information: (a) the Fruit Box Agreement Information; (b) the Fruit Box Termination Information; (c) the CBA Projection Information; (d) the Pizza Pan Agreement Information; (e) the APT Agreement Information; (f) the APT No Financial Benefit Information; (g) the CITO Agreement Information; (h) the CITO Agreement; (i) the Hungry Harvest Agreement Information; (j) the Fantastic Furniture Agreement Information; (k) the Betta Homes Agreement Information; (l) the Fantastic Furniture Termination Information; (m) the Bareburger Agreement Information; (n) the NAW Projection Information; (o) the Johnny Rockets Agreement Information; (p) the Yum MSA Information; and (q) the Yum Projection Information (collectively, the **Second Placement Information**).[2445] In any case, I have already established this in relation to each of these categories of information.

[2445] Defences at [264GG].

Awareness

1782 For the reasons outlined above, Mr Macdonald was aware of the Second Placement Information (subject to the qualifications I have indicated). Mr Hunter was also aware of the Second Placement Information (but not the APT Agreement Information, Hungry Harvest Agreement Information and Fantastic Furniture Termination Information, and again, subject to the qualifications I have indicated). By reason of the knowledge of Mr Hunter and Mr Macdonald, GetSwift had knowledge of the Second Placement Information as and from the time that the Second Placement Trading Halt Announcement and Second Placement Cleansing Notice were released to the market.

General availability

1783 Since the Second Placement Information consists of all the above categories of omitted information (except for the NAW Agreement Execution Information, the Amazon MSA Information, the Betta Homes No Financial Benefit Information and the Johnny Rockets Termination Information), the aforementioned reasons evidence why the Second Placement Information, when taken together, was not generally available and was material.

Materiality

1784 GetSwift contends that ASIC has taken a "monolithic approach to the materiality" of all of the information that comprises of the Second Placement Information without regard to the "significance" of the materiality of the omitted information changing over time.[2446] This contention appears to be a repetition of its Continuing Periods Contention.[2447] For reasons that I have already explained in disposing of this contention, GetSwift's argument is not an answer.

1785 I am satisfied that in circumstances where GetSwift sought to raise $75 million, the Second Placement Information might be said to be particularly significant information. It would have provided important contextual and qualifying information to enable investors to make an informed assessment as to whether they should invest in GetSwift shares via the capital raising.

[2446] GCS at [1296]–[1297].
[2447] ASIC Reply at [421].

Conclusion

1786 I am satisfied GetSwift contravened s 674(2) of the *Corporations Act* by failing to disclose the Second Placement Information from 7 December 2017 until the date on which this proceeding commenced.

H.3.16 *Overall conclusion for s 674(2) contraventions*

1787 In light of the reasons above, I am satisfied GetSwift contravened s 674(2) in respect of all the 22 contraventions alleged.

H.4 Accessorial liability

1788 To round off the already very lengthy continuous disclosure case, it is now necessary to turn to ASIC's accessorial liability case against Mr Hunter, Mr Macdonald and Mr Eagle. As would no doubt be evident by now, ASIC alleges that each of the directors had an appreciation of the likely effect of the ASX announcements in reinforcing and engendering investor expectations, as well as the way in which the ASX announcements, if released strategically, could increase GetSwift's share price.

1789 In addressing this aspect of the continuous disclosure case, I will adopt the following structure:

- *First*, I will set out the legal principles applicable to the accessorial liability aspect of ASIC's case, focussing on s 674(2A) of the *Corporations Act*.
- *Secondly*, I will expand upon, and hone in on, certain aspects of the factual narrative, particularly in relation to the way in which the directors saw the ASX announcements as intrinsically linked to driving GetSwift's share price.
- *Thirdly*, I will make some general observations in relation to the accessorial liability case against each of the directors.
- *Fourthly*, I will turn to a more granular analysis and examine the contraventions alleged against each director in respect of each of the Enterprise Clients.

H.4.1 *The principles*

1790 To establish that Mr Hunter, Mr Macdonald and Mr Eagle are liable under s 674(2A) of the *Corporations Act* by reason of their alleged involvement in GetSwift's contraventions, ASIC must, obviously enough, establish that: (a) GetSwift contravened s 674(2) of the *Corporations Act*; and (b) the relevant director was "involved" in the contravention within the meaning of s 79 *Corporations Act*.

General principles

1791 The relevant section concerning accessorial liability is s 674(2A) of the *Corporations Act*. This provides:

> **674 Continuous disclosure—listed disclosing entity bound by a disclosure requirement in market listing rules**
>
> …
>
> (2A) A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.
>
> Note 1: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.
>
> Note 2: Section 79 defines ***involved***.

1792 Section 79 of the *Corporations Act* provides:

> **79 Involvement in contraventions**
>
> A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.

1793 A person is "knowingly concerned in" a contravention if that person was an intentional participant and had knowledge of the essential elements of the contravention: *Yorke v Lucas* (1985) 158 CLR 661 (at 670 per Mason ACJ, Wilson, Deane and Dawson JJ). For a person to have a "concern in" the contravention, there must be a practical connexion between the act or omission and the contravention: *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102; (2014) 48 WAR 1 (at 56 [294] per Edelman J); *King v Australian Securities and Investments Commission* [2018] QCA 352; (2018) 134 ACSR 105 (at 142 [166] per Morrison, McMurdo JJA and Applegarth J) (this statement of principle was not disturbed by the High Court in *Australian Securities and Investments Commission v King* [2020] HCA 4; (2020) 376 ALR 1).

1794 A person with knowledge of the essential elements does not need to know that those elements amount to a contravention: *Yorke* (at 667 per Mason ACJ, Wilson, Deane and Dawson JJ); *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)*

[1999] FCA 1161; (1999) 95 FCR 302 (at 346 [186] per Lindgren J); *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 (at 8–10 [8]–[13] per Moore J). The alleged contravenor is not required to have appreciated that the relevant conduct was unlawful, but actual knowledge of the essential elements constituting the contravention is required and imputed or constructive knowledge is insufficient: *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107; (2012) 293 ALR 537 (at 541 [11] per Emmett, Bennett and McKerracher JJ).

1795 In *EYZ Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134; (2018) 360 ALR 261, Flick, Bromberg and O'Callaghan JJ (at 263–264 [11]) approved the following, with respect, useful observations of White J in *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 (at [176]–[178]):

> 176. Although the general principles relating to accessorial liability are settled, their application in a case such as the present is not without difficulty. **In order to aid, abet, counsel or procure the relevant contravention, the person must intentionally participate in the contravention with the requisite intention**: *Yorke v Lucas* (1985) 158 CLR 661 at 667; 61 ALR 307 at 310. **In order to have the requisite intention, the person must have knowledge of "the essential matters" which go to make up the events, whether or not the person knows that those matters amount to a crime**: *Yorke v Lucas* at CLR 667; ALR 310. Although it is necessary for the person to be an intentional participant and to have knowledge of the matters or things constituting the contravention, it is not necessary for the person to know those matters or things do constitute a contravention: *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236; 193 ALR 399; [2002] FCAFC 213 at [159]–[160]. That is to say, it is not necessary that the accessory should appreciate that the conduct in question is unlawful. …
>
> 177. Actual, rather than imputed, knowledge is required. So much was made clear in *Giorgianni v R* (1985) 156 CLR 473 at 506–7; 58 ALR 641 at 665–6; 2 MVR 97 at 120–1 by Wilson, Deane and Dawson JJ …
>
> 178. The notion of being "knowingly concerned" in a contravention has a different emphasis from that of aiding, abetting, counselling or procuring" a contravention. **To be knowingly concerned in a contravention, the person must have engaged in some act or conduct which "implicates or involves him or her" in the contravention so that there be a "practical connection between" the person and the contravention**: *Construction, Forestry, Mining and Energy Union v Clarke* (2007) 164 IR 299; [2007] FCAFC 87 at [26]; *Qantas Airways Ltd v Transport Workers' Union of Australia* (2011) 280 ALR 503; [2011] FCA 470 at [324]–[325].
>
> (Emphasis added).

The "quality" of knowledge required

1796 There is some disagreement between the parties as to what might be described as the "quality" of knowledge that must be proved for the purposes of s 674(2A) of the *Corporations Act*,

although as ASIC pointed out, there is little practical difference between the rival approaches, given that ASIC contends that it can establish the accessorial liability of Messrs Hunter, Macdonald and Eagle on either approach.[2448] The issue is whether it is necessary to establish that the accessory knew that the omitted information requiring disclosure was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price or the value of the securities. Two competing lines of authority were relied upon.

1797 ASIC argues that it is not required to establish that the directors knew that the undisclosed information was material. Instead, it says that it is sufficient to prove that each of the directors ought to have known that a reasonable person would expect that the information, if it had been generally available, would have had a material effect on the price or value of the relevant securities.

1798 In support of this contention, ASIC called in aid the Full Court's decision in *Cassidy* (at 11 [15] per Moore J with whom Mansfield J agreed; Stone J dissenting at 29 [80]):

> … liability as an accessory (in circumstances where the contravening conduct of the principal was making false or misleading representations) does not depend on an affirmative answer to the question whether the alleged accessory knew the representations were false or misleading. **All that would be necessary would be for the accessory to know of the matters that enabled the representations to be characterised in that way.**
>
> (Emphasis added).

1799 ASIC submits, in effect, that all that it must prove is that the accessory had knowledge of facts or matters from which the Court could conclude that a reasonable person would expect, if the information were generally available, to have had a material effect on the price or value of the relevant securities. That is, ASIC contends that it is enough for an accessory to possess knowledge of the relevant expectations of the reasonable person or that it is a matter that the defendant ought to have known.

1800 The statement of principle in *Cassidy* upon which ASIC placed such emphasis was said to have been followed in *Propell National Valuers (WA) Pty Ltd v Australian Executor Trustees Ltd* [2012] FCAFC 31; (2012) 202 FCR 158 (at 188 [121] per Collier J with Stone J agreeing);

[2448] ACS at [1590].

Australian Securities and Investments Commission (ASIC) v ActiveSuper Pty Ltd (in liq) [2015] FCA 342; (2015) 235 FCR 181 (at 268 [456] per White J); *CellOS Software Ltd v Huber* [2018] FCA 2069; (2018) 132 ACSR 468 (at 645 [1044] per Beach J); *Miletich v Murchie* [2012] FCA 1013; (2012) 297 ALR 566 (at 590 [95] per Gray J).

1801 The directors submit ASIC must prove that the directors had actual knowledge of the information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price, relying on the reasoning in *Australian Securities and Investments Commission v Sino Australia Oil and Gas Limited (in liq)* [2016] FCA 934; (2016) 115 ACSR 437 (at 448 [54] per Davies J); *Vocation* (at 306–307 [616]–[620] per Nicholas J).

1802 In *Sino*, Davies J considered whether the second defendant was involved in a contravention of s 674(2) of the *Corporations Act*, pursuant to s 674(2A). Her Honour stated (at 448 [54]):

> … to find that Mr Shao was "involved" in the company's contravention of s 674(2), the Court needs to be satisfied that Mr Shao: (i) knew that the company's profit had deteriorated in the second half of the 2013 calendar year; and (ii) knew that this was information which was not generally available and was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price. Mr Shao in his defence admitted the second element and made partial admissions about the matters of which he had knowledge.

1803 This position was followed by Nicholas J in *Vocation* (at 307 [619]), where his Honour rejected the position put by ASIC in that case that knowledge of the underlying facts was sufficient to find liability under s 674(2A). In addition, his Honour examined the principles in relation to accessorial liability in the context of the alleged contravention of s 674(2A), and referred to *Cassidy*. Relevantly, his Honour stated (at 306 [617]):

> To my knowledge the majority view in Cassidy has been followed only once before, and that was by the Full Court in *Propell National Valuers (WA) Pty Ltd v Australian Executor Trustees Ltd* (2012) 202 FCR 158; [2012] FCAFC 31 (per Collier J at [119], Stone J agreeing at [1]). However, although *Cassidy* was cited and referred to by Collier J, **the later Full Court decision in Quinlivan was not**. Quinlivan was followed in *McGrath v HNSW Pty Ltd* (2014) 219 FCR 489; 308 ALR 542; [2014] FCA 165 (Cowdroy J) and in *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212; 285 ALR 236; [2011] FCA 973 (Logan J).
>
> (Emphasis added).

1804 The reference to *Quinlivan* is a reference to the decision of the Full Federal Court in *Quinlivan v Australian Competition & Consumer Commission* [2004] FCAFC 175; (2004) 160 FCR 1. In considering what was required to establish accessorial liability for misleading or deceptive

conduct as to future matters (under the *Trade Practices Act 1974* (Cth) (***TPA***)), the Full Court stated (at 4–5 [10] per Heerey, Sundberg and Dowsett JJ):

> [T]hree conclusions emerge. First, s 51A does not detract from the *Yorke* principle that actual knowledge of the essential elements of the contravention is required if s 75B or s 80 is to apply. **Where the contravening conduct involves misrepresentation, whether as to a future matter or not, this principle requires actual knowledge by the accessorial respondent of the falsity of the representation**. This is an essential matter which must be alleged and proved: *Su v Direct Flights International Pty Ltd* [1999] FCA 78 at [38]; *Fernandez v Glev Pty Ltd* [2000] FCA 1859 at [18].
>
> (Emphasis added).

1805 The position advanced by the directors ought to be accepted. In the context of s 674(2A), the principles concerning accessorial liability have been helpfully clarified in the recent judgment of Banks-Smith J in *Australian Securities and Investments Commission (ASIC) v Big Star Energy Ltd (No 3)* [2020] FCA 1442; (2020) 389 ALR 17. In that case, ASIC alleged that a publicly listed company on the ASX, then known as Antares Energy Limited (**Antares**), failed to disclose important information to the market at the time of the announcements in breach of its obligations of continuous disclosure. Relevantly, relief was also sought against Antares' Chairman and Chief Executive Officer on the basis that he was involved in the contraventions by Antares and breached his duties as a director of the company. Her Honour stated (at 107–108 [485]–[489]):

> 485. Having reviewed the authorities since *Yorke v Lucas* and in particular the approach of the Full Court in *Quinlivan v ACCC*, and having regard to the fact that *Quinlivan v ACCC* has been applied on numerous occasions, **I do not consider that Davies J in *ASIC v Sino* was plainly wrong in her Honour's interpretation of the manner in which s 79 applies with respect to s 674(2A). It follows that I do not consider Nicholas J in *ASIC v Vocation* was plainly wrong in accepting the approach of Davies J**.
>
> ….
>
> 489. Accordingly, applying what was said in *ASIC v Sino*, the Court must be satisfied that at a time contemporaneous with the contravention, [the director]:
>
> (a) knew of the relevant information;
>
> (b) knew that the information was not generally available; and
>
> (c) **knew that the information** was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price.
>
> (Emphasis added).

1806 With respect to her Honour, I agree. I will adopt this approach to determine the accessorial liability of each of the directors in the present case. Further, although liability was not

established in *Big Star Energy* (at 111 [505]), her Honour went on to note the following two points by way of conclusion:

> First, although in *ASIC v Sino* liability was established under s 674(2A) based on admissions (as was also the case in *Australian Securities and Investment Commission v Padbury Mining Ltd* (2016) 116 ACSR 208; [2016] FCA 990), it is not the case that there must be admissions in order to establish liability. Second, the fact that a director elects not to give evidence does not mean that it will necessarily be difficult to establish liability for a s 674(2A) case. Whether or not liability is established where proof of actual knowledge is required will depend upon the circumstances of each case.

1807 The present case is of the kind envisaged by her Honour, in that while no admissions have been made under s 674(2A), nor have the directors given evidence, I have found, in certain circumstances, that liability is established under s 674(2A) of the *Corporations Act*.

H.4.2 *The directors and their approach to ASX announcements*

1808 I have already detailed in depth the factual narrative in respect of GetSwift and each Enterprise Client in Part G. What I propose to do in this section is draw out the salient aspects of that evidence, as well outline some further evidence of communications, which demonstrate the degree of focus each of the directors placed on the relationship between the ASX announcements, share price and investor expectations. I should note that, like in Part G, through this process, I am making findings as to the occurrence and content of the communications outlined.

Approach to the Fruit Box and CBA Announcements

1809 In respect of the Fruit Box and CBA Announcements, the documentary evidence demonstrates that Mr Hunter was fixated on share price, attempted to time the making of the ASX announcements to achieve maximum impact, and recognised that the failure to make positive announcements would have a negative impact on investor expectations and the share price. The evidence concerning Mr Macdonald is more limited, although still demonstrates he too was engrossed with GetSwift's share price, including the impacts of any delay on the share price. The evidence in respect of Mr Eagle in respect of these two announcements is scarce (noting relevantly that no case has been brought against him in respect of CBA).

1810 From as early as January 2017, Mr Hunter discussed delaying the Fruit Box Announcement to align it with the appointment of a number of new board advisors.[2449] For example, on 23 January 2017, in response to a request from Ms Katrina Goh to finalise a draft announcement of the Fruit Box Announcement, he sent an email to Ms Goh (a Senior Account Manager at M+C Partners) stating:

> [W]e will want to delay the box corporate announcement until February. There are a number of new board advisors that have a huge profile coming aboard so we want to make sure we time it all properly. I'll finalize market announcement paper today for you.[2450]

1811 Ms Goh was alive to the dangers; she sensibly responded:

> Regarding Box Corporate, we recommend you apply a consistent threshold 'trigger point' to announce a contract to market for all contracts announced.
>
> **This is not only to ensure compliance with continuous disclosure obligations, but also to ensure the investor community receives consistent messaging around contract wins and can more easily evaluate their importance.**
>
> The trigger could be at the time a contract is signed, at the time a trial is completed and converts into a regular contract, or at the time a company is fully integrated onto the platform and starts deployment, but we would advise a consistent approach is needed.
>
> Our understanding is that Box Corporate is signed on to commence use of the platform in January. If you are already announcing PMA, it is appropriate to announce Box Corporate at the same time.
>
> **We want to avoid a situation where we're crafting announcements after the information is publicly available.** For example with Jamila's appointment to CIO. Again, with the upcoming Advisory Board appointments, **we should be announcing these as they happen**.[2451]

1812 Further, in an email to Mr Mison, Mr Hunter also discussed timing the Fruit Box Announcement to ensure that it would occur *after* GetSwift had made a release to the market that it had made one million deliveries in total:

> Can I see the draft for the lm aggregate total this week? We will aim release it next week. Also we need the Box Corporate announcement in a separate release. It's a large contract - 3 year exclusive w 100+ k a month deliveries. We will decide on the timing for Box after the 1m notice.[2452]

[2449] GSW.0027.0001.1641.
[2450] GSW.0027.0001.1641 at 1642.
[2451] GSW.0027.0001.1641 (emphasis added).
[2452] GSWASIC00027054.

1813 On 20 February 2017, Mr Hunter sent an email to Mr Macdonald concerning the timing of the Fruit Box Announcement in relation to the imminent CBA agreement and GetSwift's share price. The email stated:

> Let's sort out box contract today if possible and I will finish the announcement - if we can put it out before the CBA one next week it will be a good boost, plus it makes the 1m buy that Martin wants go closer to 45-46c . After CBA we hopefully are above 50c may even be 55-60c.[2453]

1814 Similarly, on 21 February 2017, Mr Hunter sent an email to Mr Eagle which stated:

> Ps look at our stock price right now and tell me my strategy is wrong. We are almost at 50c. That's an outperform [*sic*] of anything on the exchange.[2454]

1815 One minute later, Mr Hunter sent another email to Mr Eagle in which he stated: "You just made 130% returns in 3 months on our shares": see [239]–[240].[2455]

1816 When the Fruit Box Announcement was ready, Mr Hunter instructed Mr Mison that the announcement be released before the market opened for trading and marked as price sensitive. Mr Macdonald repeated Mr Hunter's directions concerning the release of the announcement, instructing Mr Mison to release the announcement "first thing with market opening".[2456] A few hours later, he sent a follow-up email to Mr Mison, which stated, "[o]bviously need to tag as price sensitive as well".[2457]

1817 After receiving confirmation that the Fruit Box Agreement had been released, Mr Hunter sent the email to Ms Gordon, I referred to in the introduction stating: "Bit by bit until we get to a $7.50 share price :)".[2458] It is convenient here to set out again, how Mr Hunter followed up, with his email to Mr Macdonald, Mr Eagle and Ms Gordon:

> I wanted to take a quick moment and just put some things into context – today's strategic account contract capture information and the timing of the release added approx. $3.8m to the companies [*sic*] market cap. That's making all our shareholders much happier.
>
> To date since IPO listing price I am pleased to inform you that the company share price is up 140% - the strongest performer on the ASX. **That means that I have driven the**

[2453] GSWASIC00026443.
[2454] GSWASIC00067944.
[2455] GSWASIC00067944.
[2456] GSWASIC00025688.
[2457] GSWASIC00025688.
[2458] GSWASIC00025659.

> **market value of the company up by more than $36m in 3 months**. We are now worth more than $63M and heading towards $200m in very short order. **These results are not accidental.**
>
> Therefore please keep that in mind when I insist on certain structural and orderly processes that there are much more complex requirements that are at play.
>
> It is also important to stress that it is imperative that non commercial [*sic*] structures and resources we have in place are fully supporting the revenue and market cap based portions of the company. These have absolute priority over anything else. Without those as our primary focus not much progress will be made.
>
> We have a tremendous year ahead of us and the timely planning and delivery of key commercial accounts is paramount. … Failure to do so will prompt an [*sic*] revised management structure.
>
> In May we will be under the spotlight again with another significant investment round planned leading up to a much larger and final round in Oct or thereabouts. So as you can imagine I will not wait until May to course correct this organization staffing [if] we are not tracing as planned or better than planned.
>
> Folks I am serious about this , please do not that there was no fair notice given of the expectations needed. Please do not confuse my friendly attitude for tolerance or forgiveness when it comes to achieving the deliverables set in front of us. There is too much at stake to allow for any lack of control. If you are unable or unwilling to operate as such please let me know.
>
> This company if we achieve or our **objectives in 2 years [*sic*] be valued well above the $800M + market cap**, and **no excuse will stand in our way to reach that goal.** The **rewards will be fantastic and amazing especially when you consider the timeline**, so let's stay focussed now more than ever.[2459]

1818 Apart from demonstrating Mr Hunter's apparent self-regard, and his control and concern in relation to the market capitalisation, this email also reveals how Mr Hunter informed the directors that the "timely planning and delivery of key commercial accounts is paramount" and that there would be a spotlight on GetSwift with the impending capital raise in May and a further capital raise to be conducted in October or thereabouts.

1819 The approach to the CBA Announcement was similar. On 22 February 2017, Mr Hunter communicated his concerns to Ms Gordon (copied to Mr Macdonald and Mr Eagle) that CBA would amend the wording of the draft media release and recognised that an amendment in this manner would impact the share price:

> I always believe that fate [*sic*] accompli solves many "hurdles". Note there are a boatload of dependencies in this particular case - **the careful wording of release being**

[2459] GSW.0015.0001.0808 (emphasis added).

> **prime consideration not just the deadline itself . If the wording gets changed or diluted (especially when we had Ed agree to rubber stamp it** -check his email if you don't believe me) then **this will be a failure and will directly impact not only our share price , but our capital raise** . And that's why I am not pleased.[2460]

1820 When the CBA contract was not progressing as quickly as he expected, Mr Hunter sent the following email to Ms Gordon on 24 March 2017 (copied to Mr Macdonald and Mr Eagle):

> As you may have noticed due to the delay in our overall PR (because we put it all on hold for CBA expecting to put out that release) our stock price has taken a hit from 64c to low 50s - which is exactly like I feared. So this has had a [*sic*] impact of roughly $12million in our market cap. These sort of misunderstandings are quite costly for us.
>
> …
>
> So CBA needs to move at the speed of business if it is to succeed. We cannot let them think that it will take 3 months to develop an integration and app-that's not wise. The message is we will deploy rapidly in select markets first then nationally – it's what we have done in the past and what has worked very well at MTV, Conde Nast and other large groups . **We will handle messaging jointly from now on.**
>
> So let's make sure that going forward we have joint calls with CBA to ensure we are all in the same page. **We will NOT entertain any negative impacts to our core business.** In May I have commitments from multiple investors for millions of $ of capital - and **I will not ruin my relationship, reputation or trust with them, or put this company in a holding pattern as a result.**[2461]

1821 On 28 March 217, Mr Hunter also sent the following email to Ms Gordon (copied to Mr Macdonald and Mr Eagle) focussing on the impact of delay on investor expectations and share price:

> [T]here were no changes from the document he sent- was that not explained? More delays....Thats [*sic*] why I wanted us to sign off FIRST and let them know their version was accepted. I dont [*sic*] understand what is being said here back and forth. With all due respect I worked for large banks for more than 10 years of my career so I think I know what i [*sic*] am speaking about - there is process and there is using procedures to delay unnecessarily.
>
> This is bordering on ridiculous and a waste of our time…. My thoughts : If this is not in place within the next 36 hours we move on and classify this as failed regardless of the excuses (and just as delay tactics). **Jamila - this delay is actually now a negative to the share price and company position and becoming a very obvious impediment.** I have to do some serious talking now to our investors and partners when this falls apart.
>
> Joel- Brett - your thoughts?[2462]

[2460] GSWASIC00025854 (emphasis added).
[2461] GSWASIC00031219 (emphasis added).
[2462] GSWASIC00068137 (emphasis added).

1822 One could say a number of things about this email, but it suffices to remark that it does tend to confirm the nature of the relationship between Mr Hunter and Ms Gordon and Mr Hunter's management style.

1823 Mr Macdonald sent a similarly revealing email to Ms Gordon that evening, stating:

> Hi Jamila,
>
> The decision has been made internally to de-prioritize CBA. If it comes through great, but no more focus from you should be placed on this contract.
>
> **Due to consistently missed deadlines with the CBA process as well as the changes they made from a last minute PR commitment (deadlines that were communicated to our stakeholders, investors and PR team), this delay and focus has actually caused a negative impact on our share price to say nothing of the capital spent. I have looked at the trend and it has cost us more than $13M in value - let me repeat this - a negative $13M hit. As such we need to pivot as we cannot afford anymore time wasted on this engagement.**
>
> We have an important meeting this Friday with a USD $14 Billion company who has asked specifically about our scalability, architecture and security. We will (as we do best) handle the commercial & business side for GetSwift and what we are measuring you on is technical stability, security and scalability. We are in the running to deploy GetSwift to more than 6500 locations in the US, and this is something that Sig, John and Bane have put lot of effort into so it would not be wise for us to fail on the technical side of the equation. This is a very large revenue stream for us, so we will be evaluated accordingly.
>
> As CBA is now no longer a priority - I need you to stop any activity that is outside of technology and focus 100% on what you have been brought in to do - which is leadership in technology and technology only. That was the reason you were appointed to the board - to provide guidance from a technical mandate only. Since you decided to take on a [*sic*] operational role as our CIO, that means you need to make sure that our technology scales and remains stable & secure not only from a high level view but on a daily basis.
>
> There has been too much effort placed on non productive [*sic*] outcomes and meetings, so this is stopping today. The future and growth of our company is at stake. We have managed it a very specific way to get it to this point, and we will not change our approach. I realise that you may wish to extend your mandate into other areas, but this is not something that we need or can offer an opportunity to experiment with anymore. Results in a timely manner are the only thing that counts with the investors backing us - they could not care less what the excuses may be.[2463]

1824 The following day, on 29 March 2017, Mr Macdonald sent an email to Mr Hunter in which he suggested hiring someone to manage writing and publishing ASX announcements. Mr Hunter

[2463] GSWASIC00023874 (emphasis added).

responded: "I need to do this – it's [a] very specific skill set".[2464] Mr Macdonald replied in an email which included a list of possible future announcements to the ASX. He asked "which ones would you like to push next?", to which Hunter replied: "Lone Star, Mobi, cross town , CBA, [Pizza Pan] in that order if possible - **need to see effect of first 2 to judge the next few etc**".[2465]

1825 The same day, Mr Hunter sent an email to Ms Gordon, Mr Macdonald and Mr Eagle concerning the impact of the delays in obtaining the CBA Agreement on GetSwift's share price as well as its impact on market expectations:

> As you may be aware [*sic*] of our share price has taken a significant downturn - effectively we have had a aprox [*sic*] $25m hit in our valuation.
>
> The only fundamental reason for this is our **lack of ability to continue to time our announcements and market expectations**. What I mean by this directly is that if the market expects an announcement and we do not make it , **it gets compounded from a negative perspective the longer it takes**. This seems to be something not everyone on the board had knowledge or experience with.
>
> Specific to this is the CBA agreement . Quite frankly it has been a **negative impact on us to date** … The deal as it stands right now will at best maybe correct the downward curve, but without the joint PR it will struggle to exceed the level we were before hand . Net net [*sic*] we may at best have a zero sum game in the short term.
>
> Furthermore I want to make everyone crystal clear that this series of events will impact not only our forthcoming capital raise but also the timing of it. Investors and stakeholders have lost confidence in our ability to accurately predict outcomes.
>
> …
>
> Needless to say performance and impact have a direct effect on compensation and tenure.[2466]

1826 On 1 April 2017, Mr Hunter sent an email to Mr Macdonald which stated: "We need to start putting stuff out next week. I want to put one out before the CBA one. So ideally in this order subject to change of course based on client outcomes".[2467] He listed 14 announcements in the email, including CBA, CITO Transport, and Pizza Pan.

[2464] GSWASIC00023808.
[2465] GSWASIC00023808 (emphasis added).
[2466] GSWASIC00023824 (emphasis added).
[2467] GSWASIC00023604.

1827 On 3 April 2017, Mr Hunter instructed Mr Mison to mark the CBA announcement as "price sensitive", stating: "[L]ets make sure we don't miss that one! NO mistakes on that one."[2468]

1828 In a subsequent email to Mr Mison, Mr Macdonald, Ms Gordon and Mr Eagle on 4 April 2017, Mr Hunter highlighted the benefit of delaying the next series of announcement, stating: "We will wait until after ANZAC Day for the next series of announcements otherwise the impact will be diluted".[2469] The same day, Mr Macdonald sent an email to GetSwift's investors, which stated:

> Dear Investors
>
> This morning's announcement is not only a game changer for our company, but has a very real potential to completely change the competitive landscape and redefine this sector.
>
> As you may have gathered by now, we tend to operate very much in stealth mode until we are ready to deliver news that has real and tangible outcomes. We expect the company will have a number of similarly weighted announcements down the road.[2470]

1829 Also on 4 April 2017, Mr Polites sent an email to both Mr Hunter and Mr Macdonald with the subject line "Also, congrats! That share bump is killer!" The email stated, "[k]now this has been a lot of hard work for you guys. Thrilled to see it pay off!"[2471]

1830 On 13 November 2017, Mr Hunter expressed concerns that the lack of progress with CBA was having a negative impact on GetSwift's share price. In an email to Ms Gordon (copied to Mr Macdonald and Mr Eagle), Mr Hunter stated:

> I cannot stress how vital it is to get the new flow going LIVE in the next two weeks. Our [share price] is being affected because there is no status update on the CBA project , that being the case refer back to what I said months ago that it will do more harm than good. Effectively the CBA lack of progress has wiped out the gains we had with NA Williams announcement. Not happy and neither are the shareholders. So let's hope for everyone's sake that this crosses the line, because the excuses will not fly.[2472]

[2468] GSWASIC00030332.
[2469] GSWASIC00030318.
[2470] GSWASIC00023324.
[2471] GSW.0019.0001.3832.
[2472] GSWASIC00004415.

Delivery volumes and revenue important to investor expectations

1831 On 20 April 2017, Ms Gordon raised a concern, initially in an email sent to Mr Hunter (copied to Messrs Macdonald, Eagle and Mison), and later on the same day at a board meeting attended by Messrs Hunter, Eagle and Macdonald, that a proposed announcement regarding an agreement GetSwift had entered into with a client, Tucker Fox, may not have been sufficiently material to warrant announcing to the ASX, stating:

> I've looked at their site, and they appear - and refer to themselves as - a small business that operates in regional Victoria. Do we have realistic volumes that would explain why we are announcing this to the ASX? Is this material?[2473]

1832 The response she received from Mr Hunter was characteristic:

> Its [*sic*] good to get feedback and to provide governance, but your note undermined the credibility of the materiel *[sic]* facts and you brought it to Scotts [*sic*] attention - guess what happens from there on? Not good.[2474]

1833 Prompted by Ms Gordon's genuine concern, on 1 May 2017, Mr Hunter sent an email to Mr Mison (copied to Ms Gordon and Messrs Macdonald and Eagle), outlining what Mr Hunter considered to be "material" for the purposes of GetSwift making an announcement to the ASX concerning any agreements it has entered into. In this email, Mr Hunter stated:

> All,
>
> We just had a call to address the potential confusion concerning any announcements that the company will put out regarding contracts. To summarize [*sic*]:
>
> 1, [*sic*] Any contract that has the potential to impact present delivery volumes (on the date the announcement is made) by at least 5% of more per month is to be considered material. (Ie at 200k per month a material contract would be 10K+ a month)
>
> 2. To the best of our knowledge any representations made are accurate and truthful. …
>
> 3. Information about the client is to be backed by their own data that is made to us or is in the public domain …
>
> 4. At a later stage we will group a number of small transactions into one announcement to meet volume criteria.
>
> With that in [mind] unless there are any objections we should proceed with the release. Scott unless you get a [*sic*] objection in the next 30 minutes or advise yourself otherwise, would you be so kind as to lodge this at noon Sydney time?[2475]

[2473] Gordon Affidavit (GSW.0009.0021.0001_R) at [44]–[51]; GSWASIC00021278.
[2474] GSWASIC00021278.
[2475] GSWASIC00057998.

1834 This email demonstrates that Messrs Hunter, Macdonald and Eagle (the latter two by reason of being copied into Mr Hunter's email) knew that the information about potential impact on delivery volumes and revenue was perceived to be likely material and important to the expectations of investors.

Positioning of the Pizza Hut Announcement

1835 There is a body of evidence in respect of the Pizza Hut Announcement, which demonstrates Mr Hunter knew the importance of the ASX announcements to growing GetSwift's business.

1836 On 24 April 2017, Mr Hunter received an email from Mr Polites (copied to Ms Hughan and Mr Macdonald), which stated:

> Quick one regarding your ASX announcement later this week on Pizza Hut and Eagle Boys. Are you doing this as a separate announcement? Or as part of your 4C? If it's a separate announcement, can we see a draft beforehand?[2476]

1837 In his reply, Mr Hunter confirmed that the Appendix 4C would refer to GetSwift's agreement with Pizza Hut and the agreement would also be the subject of a separate announcement to the ASX.[2477] On 25 April 2017, Ms Hughan responded to Mr Hunter's email stating:

> Given the traction you have had with the other ASX announcements on your deals and the resulting bump you have seen in share price, it is likely that your news may be picked up by the investor press. This is something we can't really stop once the ASX announcement is public.
>
> But we will wait and let you know what reactive media does come through on the day; rather than proactively pitch your share price jump as we have done with past media, including the CBA deal.[2478]

1838 Mr Hunter replied stating "Yup [*sic*] - just being sensitive to the client who doesn't want to do a PR push now, but a more coordinated one later". Ms Hughan responded that she would "keep an eye out for share price news across the day but won't proactively pitch anything".[2479]

1839 The same day, Mr Hunter sent the following email to Mr Eagle, Mr Macdonald and Ms Gordon, advising that:

> I want us to be ready to announce 4C, the ESOP grants and PH this week. Please make sure that what is required for this is [*sic*] place. This means by Thu NYC time. We cant

[2476] GSWASIC00022066.
[2477] GSWASIC00022066.
[2478] GSWASIC00021791.
[2479] GSWASIC00021791.

> miss this.
>
> So:
>
> 1. ESOP - in place and agreed tomorrow. To be filed on Friday with 4C
>
> 2. 4c goes out on Fri mid day [*sic*] – no review other than by board
>
> 3. PH announcement – goes out at same time as 4c
>
> **The company will furthermore have [more] announcements – probably one every week or 10 days for the next 60 days.**
>
> Lets get it done![2480]

1840 The reference to releasing an ASX announcement every week, or every 10 days, for the next 60 days, suggests that Mr Hunter understood the importance of regular announcements as to influencing investors' expectations and driving the upward trajectory of the share price.

1841 In the evening of ANZAC Day 2017, Mr Hunter sent an email to Mr Macdonald about further proposed announcements to be made by GetSwift, in which he stated: "Need info on the latest co (Advance) - send me link so I can do that one as well pls. We will have 7 definite with that one and then 2 more in reserve. So a 9 week program![2481] This email is significant because it indicates that both Mr Hunter and Mr Macdonald had a general understanding of the way in which GetSwift approached the release of ASX announcements.

Strategic timing of announcements to maximise impact on share price

1842 As highlighted above, the documentary record indicates that Mr Hunter and Mr Macdonald each made decisions to withhold making ASX announcements until they perceived there to be a more opportune moment. In respect of the other Enterprise Clients, the following documentary evidence reaffirms this point.

1843 The Hungry Harvest Announcement was not lodged until some time had passed since the Hungry Harvest Agreement had been signed: see [565]–[572]. In relation to this announcement, Mr Hunter recognised the way in which the ASX announcements reinforced and engendered investor expectations, and thereby increase the share price. For example, in an

[2480] GSWASIC00021780 (emphasis added).
[2481] GSWASIC00021378.

email to Mr Macdonald dated 31 May 2017, the subject of the email stated, "[r]eview then lets [*sic*] send out – we need to continue the dialogue [with] the market".[2482]

1844 Similarly, decisions appear to have been made to ensure that ASX announcements better aligned with GetSwift's capital raises and media strategies. In an email with the subject line "Media update – July 14" that was sent to Mr Hunter on 14 July 2017, Mr Macdonald stated:

> We need USA and EU press!! for [*sic*] me I am done with AUS
>
> ASX is enough for us there.
>
> Im [*sic*] thinking I reach out to a few journos in techcrunch and mashable etc [*sic*].
>
> $24M raise plus takeway.com/vietnammm announcement
>
> Thoughts?[2483]

1845 Mr Hunter responded in the following terms:

> Agreed – its time to move away a bit, but don't [*sic*] forget that our [share price] is based on our messaging to the Oz market. So we cant go all silent until we pull onto the nasdeq [*sic*]. **Right now the Oz market is a cheap way for us to get the message out**. We need wins in the US before we do anything substantial.[2484]

1846 On 21 July 2017, Mr Hunter sent an email to Mr Macdonald with the subject line "[l]ist of announcements" in which he stated: "BETTA, Fantastic Furniture, Bareburger, Zambrero NZ … Let me know as soon as the contracts are in".[2485] In this email, Mr Hunter specified a list of 17 companies.[2486] This email reaffirms the general understanding between Mr Hunter and Mr Macdonald as to the way in which GetSwift would approach the release of ASX announcements.

1847 On 30 July 2017, Mr Macdonald sent the following email to Mr Hunter:

> OK so when do you want to release this one?
>
> This is the AUS retailer's "Amazon response"
>
> Here is some info

[2482] GSWASIC00071009.
[2483] GSWASIC00016218.
[2484] GSWASIC00016218.
[2485] GSWASIC00015360.
[2486] GSWASIC00015360.

https://www.fantasticfurniture.com.au/

https://en.wikipedia.org/wiki/Fantastic_Furniture[2487]

1848 Mr Hunter responded the same day, stating: "After EGM".[2488]

1849 This knowledge of the effect of the timing of announcements, is further demonstrated by the communications between Mr Hunter and Mr Macdonald in relation to the NA Williams announcement as well as the Fantastic Furniture and Betta Homes Announcement (which were later combined into a single announcement). For example, on 9 June 2017, Mr Hunter sent Mr Macdonald the following email:

> Please review before I send them along to our PR team first then onto our advisers for comment. I added the comment in NA Williams on purpose - Chairman to Chairman to set the market tone (not to get credit, this was a joint effort by Joel and myself). If you think we should put both of us down let me know.
>
> Need to know where we are with Sony.
>
> Next hopefully we have Coke. If we can get Coke MSA before the NA then we go with that one. Will write that next.
>
> **In the interim I think we release Betta tonight, followed next week by FF, then the week after NA etc.[2489]**

1850 Similarly, on 21 July 2017, Mr Hunter "Let me know what I need to prepare - so as contracts get in or are signed I will write things up and get them in the right order/time for release :)".[2490] Following which there was an exchange of emails in which Mr Hunter and Mr Macdonald exchanged a list of announcements for release, stating (see [611]–[612]):

- BETTA
- Fantastic Furniture
- Bareburger
- Zambrero NZ

Let me know as soon as the contracts are in.[2491]

[2487] GSWASIC00014602 attaching GSWASIC00014603.
[2488] GSWASIC00014590.
[2489] GSWASIC00057422 (emphasis added).
[2490] GSWASIC00015360.
[2491] GSWASIC00015360 at 5361.

1851 On 26 August 2017, Mr Hunter sent an email to Mr Macdonald, which listed the ASX announcements that GetSwift proposed to make in the future and their order. The list included a heading "Next week", under which were the words "Bare burger". Mr Macdonald replied to the email, indicating that he agreed with the order of the proposed announcements to the ASX.[2492]

Marking ASX announcements as price sensitive

1852 Messrs Hunter and Macdonald were keenly attuned to the need for the ASX announcements to be marked as price sensitive upon their lodgement with, and release by, the ASX (Mr Eagle was too, but his focus was more administrative, as I explain below: see [1944]. Mr Mison and Mr Banson received regular instructions to have certain ASX announcements marked as price sensitive and, when the ASX did not accede to some of these requests, Messrs Hunter, Macdonald and Eagle sought to persuade the ASX's MAO and its Listings Compliance team to amend their procedures to facilitate the release of GetSwift's announcements as price sensitive.

1853 For example, on 4 April 2017, after having lodged the CBA Announcement, Mr Mison received an email from Ms Czajkowskyj from the ASX stating that the ASX retained a final decision as to whether any announcement would be published as price sensitive.[2493] Mr Mison forwarded this email to Mr Eagle.[2494] From that time onwards, Mr Mison gave evidence that he sent an email to the ASX's MAO team when he was instructed that an announcement should be marked as price sensitive.[2495]

1854 In the context of the Fantastic Furniture & Betta Homes Announcement, Mr Hunter was particularly displeased upon learning that the announcement was not marked as price sensitive. In an email of 23 August 2017 to Mr Mison, Mr Hunter stated in an aggressive tone:

> Can you please let us know why was this not marked as material? Did we submit it as such? And please don't tell me that we did not instruct you to do so, because this is not the first time something like this has gone out. We have done this before. The ASX officer will only remove material indicators and not assign them if they find they are

[2492] GSWASIC00011727.
[2493] GSWASIC00023367.
[2494] GSWASIC00023367.
[2495] Mison Affidavit (GSW.0009.0036.0001_R) at [53].

> not valid.
>
> So one of two things has occurred here – either we submitted marked as material and it removed by them, or it was never submitted as material. If it is not the former this is a serious error, and a second error in judgment one on this notice alone.
>
> Joel/Brett please contact the ASX liaison officer and get me the facts right away. Pending those we will then make the appropriate decisions.[2496]

1855 Following this email, Mr Macdonald sent an email to Mr Kabega at the ASX (copied to Mr Hunter and Mr Eagle) seeking information as to who determined whether a release was market sensitive and sought information as to when and at what time Mr Mison had submitted the announcement for release.[2497] Mr Hunter, who was copied to Mr Kabega's email responding to Mr Macdonald's enquiry, sent an email to Mr Macdonald and Mr Eagle stating, "[t]his has an effect on the SP – so something to keep in mind when we talk to them in the future".[2498] Mr Eagle also made a telephone call to Mr Kabega making similar enquiries.[2499]

1856 GetSwift encountered similar issues with the ASX in respect of the release of the Bareburger Announcement. By way of background, on 24 August 2017, Mr Hunter sent an email to Ms Hughan of M+C Partners (copied to Mr Macdonald) attaching a draft announcement concerning GetSwift's entry into the Bareburger Agreement.[2500] As noted above, there was a discussion between Mr Hunter and Mr Macdonald as to the timing of this announcement: see [1850]. On 29 August 2017, Mr Hunter sent an email to Mr Macdonald and Messrs O'Connel, Amron D'Silva and Cameron Leslie of Union Square Capital, a private equity advisory firm, attaching a draft announcement concerning GetSwift's entry into the Bareburger Agreement.[2501] In this email, Mr Hunter stated: "This will go out soon. Probably either just before the FY17 report (Aug 31st) or right after. Comments are welcome".[2502]

[2496] GSWASIC00012680.
[2497] GSWASIC00012673; Kabega Affidavit (GSW.0009.0010.0001_R) at [42]–[44].
[2498] GSWASIC00012667.
[2499] Kabega Affidavit (GSW.0009.0010.0001_R) at [42]–[44]; GSWASIC00012667.
[2500] GSWASIC00012594 attaching GSWASIC00012599.
[2501] GSWASIC00056739 attaching GSWASIC00039788.
[2502] GSWASIC00056739.

1857 On 30 August 2017, at 6:07am, Mr D'Silva sent an email to Messrs Hunter and Macdonald, attaching an amended draft announcement concerning GetSwift's entry into the Bareburger Agreement.[2503] In this email, Mr D'Silva stated:

> Thank you for your email and for sending us this announcement to review. Congrats on the announcement firstly! Bareburger is a fantastic, growing chain and just the kind of company that is fantastic to align the GetSwift brand with! Im actually a big fan of the food! And next to Sweetgreens is probably my fave [*sic*] restaurant franchise in NYC! (p.s. i'm [*sic*] going to try and get Sweetgreens obviously with GSW too! :))
>
> I've attached our suggestions on the bareburger announcement for your review.[2504]

1858 At 6:13am, Mr Hunter sent an email to Messrs Macdonald and Eagle and Ms Gordon, attaching a further draft announcement concerning GetSwift's entry into the Bareburger Agreement. This version of the announcement incorporated changes made by the "US based corp [*sic*] guys", which appear to be advisers from Union Square Capital.[2505] In this email, Mr Hunter stated:

> The next announcement after the FY17 release will be big. This one goes out today with a price sensitive marker.[2506]

1859 At 9:56am, Mr Eagle sent an email to Messrs Hunter and Macdonald regarding the marking of the Bareburger Announcement as price sensitive. In this email, Mr Eagle stated:

> Gents again just a quick fyi [*sic*]. I have been on the phone a number of times this morning shepharding [*sic*] this announcement through. Again ASX resisted any price sensitive flag and request was for it to be delayed pending a conf [*sic*] call with me. **I told them to fxxx off [*sic*] and just release it without stupid delays... worked this time but this needs for ASX processes some follow up which I will attend to after year end report matters....**[2507]

1860 On 12 September 2017, following further issues raised by GetSwift with ASX, the ASX placed GetSwift on its "watchlist"; meaning that any future announcements lodged to the ASX by GetSwift would be diverted by the ASX's MAO team to its Listings Compliance team for review and approval prior to release.[2508]

[2503] GSWASIC00056594 attaching GSWASIC00039631.
[2504] GSWASIC00056594.
[2505] GSWASIC00056588 attaching GSWASIC00039630.
[2506] GSWASIC00056588.
[2507] GSWASIC00039606 (emphasis added).
[2508] Kabega Affidavit (GSW.0009.0010.0001_R) at [65].

1861 On 19 September 2017, GetSwift sent a letter to the ASX (signed by Mr Eagle) raising concerns about the ASX's determinations as to the price sensitivity of GetSwift's market announcements and sought a commitment from the ASX that GetSwift would be notified if the ASX made a decision about price sensitivity of an announcement which was different to that requested by GetSwift.[2509] This practice was thereafter followed for a short period of time.[2510]

1862 In latter half of October 2017, the ASX changed its practice relating to GetSwift's announcements to the ASX such that, if GetSwift believed that an announcement was to be marked price sensitive, GetSwift would contact MAO in advance and the ASX would then release the announcement as price sensitive.[2511]

1863 On 25 October 2017, at 10:40am, Mr Banson sent an email to Mr Macdonald (copied to Messrs Hunter, Lawrence and Eagle and Ms Gordon), in which he stated that the Johnny Rockets Announcement had been submitted to the ASX.[2512] Mr Macdonald had instructed Mr Banson to request that the announcement be marked as "price sensitive following normal procedure of calling MOA [*sic*] to confirm price sensitivity".[2513] At 11am, Mr Vaughan sent an email to Mr Macdonald (copied to Messrs Hunter, Eagle, Banson and Lawrence and Ms Gordon), stating:

> Zane from our office is currently in a meeting so he has asked me to liaise with you about the attached announcement you're requesting lodgement of.
>
> I understand you are wanting ASX to lodge this announcement as 'price sensitive' but without even needing to send this to ASX, I can advise that with its current content it wont be able to be deemed price sensitive. The announcement is too vague and discusses who the partner is, but no actual specifics of the deal you've struck.
>
> As per the issues with gaining price sensitivity of the announcement made on 12 Sept 2017 surrounding the NA Williams deal, in accordance with the Listing Rules, the announcement must detail the potential material effect that the proposed deal will on Revenues and/or Assets of the company. In its current form this announcement does not achieve this hurdle.
>
> Please refer to your announcement made on 12 Sept 2017 which I've reattached where is [*sic*] talks about the potential increase to revenues in paragraph 2, and also the increase in transactions and time period the deal will take to reach that level in paragraph 4.

[2509] GSW.1001.0001.0138 attaching GSW.1001.0001.0139; Kabega Affidavit (GSW.0009.0010.0001_R) at [68].
[2510] See, for example, Kabega Affidavit (GSW.0009.0010.0001_R) at [68].
[2511] Kabega Affidavit (GSW.0009.0010.0001_R) at [77].
[2512] GSWASIC00006180.
[2513] GSWASIC00006180.

> Please let me refer you to the Listing Rule Guidance Note surrounding their Price Sensitivity assessment: http://www.asx.com.au/documents/about/guidance-note-8-clean-copy.pdf.[2514]

1864 At 11:02am, Mr Macdonald responded to Mr Vaughan's email (copied to Messrs Hunter, Eagle, Banson and Lawrence and Ms Gordon), and confirmed that the announcement was "material and is market sensitive". In this email, Mr Macdonald stated:

> We stayed [*sic*] the delivery count will be in the millions That [*sic*] is material and is market sensitive
>
> Asx [*sic*] has recently instructed us to call the MAO after submission to confirm this with them over the phone to ensure it goes market sensitive.[2515]

1865 At 11:06am, Mr Hunter sent an email to Messrs Macdonald, Vaughan, Banson, Eagle and Lawrence and Ms Gordon, in which he stated:

> Please check some of the other announcements from other companies in the same sector w [*sic*] much less info. We stated region and number of deliveries in ours which most of them don't. The process we agreed to with the ASX is to call the Mao [*sic*] team and inform them verbally that this is market sensitive.
>
> Brett can you please facilitate if there are issues ?
>
> We should not be having these hurdles .[2516]

1866 At 11:14am, Mr Hunter sent a further email to Mr Vaughan (copied to Messrs Macdonald, Banson, Eagle and Lawrence and Ms Gordon) in which he instructed Mr Eagle to assist Mr Vaughan in arranging for the announcement to be marked as "price sensitive" upon release by the ASX. In this email, Mr Hunter stated:

> Brett please handle this - we are going in circles . [*sic*] May I point out the most recent announcements of MOU and LOI that are marked price sensitive by YoJ and DTS as an example in our sector.[2517]

1867 At 11:26am, Mr Vaughan sent an email to Messrs Macdonald, Hunter, Banson, Eagle and Lawrence and Ms Gordon, in which he stated:

> I have spoken to ASX MAO again and they have advised me that the GWS announcement is in the que [*sic*] for review and they will review it when they get to it and get back to me if there are any problems.

[2514] GSWASIC00052713 attaching GSWASIC00052715, and GSWASIC00052717.
[2515] GSWASIC00006178.
[2516] GSWASIC00006172.
[2517] GSWASIC00006154.

> They are aware of the understand [*sic*] between Andrew Black of ASX Compliance and GWS.[2518]

1868 At 11:41am, Mr Eagle sent an email to Messrs Andrew Black, Adrian Smythe and David Barnett of the ASX (copied to Messrs Hunter and Macdonald), complaining about the process for submitting announcements to the ASX for release, and the marking of those announcements as "price sensitive". In this email, Mr Eagle stated:

> It seems the proposed resolution to our frustration has not resulted in a solution. Again today we are having problems sending out an announcement and having MAO personnel stating they are not aware of any process specific to us - but all we are told is that it is in the queue for assessment. This is hard work for matters that should be normal process! Particularly after our interactions regarding these matters. Today, again, it has resulted in delays and delays in getting an announcement out.
>
> We are being treated very, very differently to other companies - we have highlighted this to you with specific examples. And **this is having a material impact on our shareholder/investor/potential investor relations that is readily documented, again as we have stated to you.** It needs to be addressed further at this point.[2519]

Delaying announcements and using news coverage

1869 The events leading up to the First NAW Announcement demonstrate the way in which Mr Hunter facilitated announcements being made in order achieve maximum impact on GetSwift's share price. The evidence below must be viewed within the context of the latter part of 2017, whereby GetSwift was embarking upon its second capital raising in which it was seeking to raise $75 million. As will become evident below, this was principally achieved through the release of the First and Second NAW Announcements and the Yum and Amazon Announcements.

1870 In an email to Mr Polites of 7 August 2017, Mr Hunter stated the following with regards to draft announcements concerning NA Williams, Fantastic Furniture, Betta Homes and Bareburger:

> ok thanks - we may have (waiting for contracts) a slew of new deals to announce in the next few weeks. Can send you announcements to review and to provide feedback with the caveat that not all contracts are in hand (so please dont [*sic*] count on it just yet - timing may be off) and this is under the strictest embargo of course. Deal?[2520]

[2518] GSWASIC00006137.
[2519] GSWASIC00006127 (emphasis added).
[2520] GSW.0019.0001.6281.

1871 Mr Polites responded to Mr Hunter (copied to Mr Macdonald), stating:

> Please keep in mind that we're about to enter earnings season. It picks up pace the middle of this week.
>
> If you want a bigger bang keep the powder dry until post August 25.[2521]

1872 Mr Hunter then sent through a series of draft announcements to Mr Polites, including announcements concerning NA Williams, Fantastic Furniture, Betta Homes and Bareburger, specifically telling him that "no releases until after earnings season then".[2522]

1873 In an email exchange with Mr Macdonald, Ms Hughan and Mr Polites on 23 and 24 August 2017, Mr Hunter stated:

> Ps one more big parteership [*sic*] just got signed. **We can release when ready** - if you can provide some suggestions it would help. The scale is pretty big.
>
> We have another smaller one, but a great brand name, and we will be announcing a titan in his field joining our advisory board (and have another one lined up thats [*sic*] a Aussie local and was featured in Vogue for example).[2523]

1874 The reference in Mr Hunter's email to a "big parteership [*sic*]" is likely a reference to GetSwift's agreement with NA Williams, and the reference to a "smaller one, but a great brand name" is likely a reference to GetSwift's agreement with Bareburger.

1875 GetSwift ultimately announced its agreement with Bareburger to the ASX on 30 August 2017 (see [708]), despite the agreement having been executed on 19 August 2017: see [695].

1876 Turning more directly to NA Williams, the documentary record reveals that the First NAW Announcement was to be the subject of a press article that was being prepared by M+C Partners and backgrounded to journalists prior to the announcement being released to the ASX.[2524]

1877 Between 5 and 6 September 2017, Mr Hunter exchanged emails with Ms Hughan concerning NA Williams, initially stating (in an email coped to Mr Macdonald): "Any updates on the PR as discussed re NA W [*sic*]? Was expecting a brief overnight but cannot find it. We plan to action this issue this week unless there is some incredible press that can be delivered next

[2521] GSW.0019.0001.6281.
[2522] GSW.0019.0001.6281 attaching GSW.0019.0001.6290, GSW.0019.0001.6288, and GSW.0019.0001.6293.
[2523] GSWASIC00012594 (emphasis added).
[2524] GSW.0019.0001.6874; GSW.0027.0002.8070.

week ![2525] Ms Hughan replied: "Apologies -- still trying to get onto the Australian journo here. Give me an hour to give him a call this morning and I'll get back to you ASAP."[2526] Mr Hunter responded: "[I]t is an interesting story especially tied in to the manufacturing sector. I would try several different journos."[2527]

1878 Ms Hughan subsequently stated: "We are locked in for The Australian in press and online next Tuesday! Can we hold off releasing until then?"[2528] Mr Hunter replied, with gusto: "yes we can!"[2529]

1879 On 6 September 2017, Ms Hughan sent an email to Mr Hunter and Mr Macdonald regarding the potential "NA Williams story" that was to be pitched to *The Australian*. Ms Hughan stated:

> Here's a list of things we'll need for the NA Williams story:
>
> - complete finalised ASX release ahead of time (if unchanged from previous version I already have this)
>
> - ASX release scheduled to go out on Tuesday morning
>
> - email comments from Bane on the deal and implications for the Aussie market.
>
> I'm just waiting to hear if David Swan has any specific questions for you, otherwise will shoot you through some Q's in the morning.
>
> Thanks for being flexible on timing with this one! Know it took a few days to get over the line.[2530]

1880 On 8 September 2017, Mr Hunter replied to Ms Hughan, providing a series of quotes and responses to a list of questions provided by Ms Hughan. Ms Hughan replied to Messrs Hunter and Macdonald, providing quotes which she proposed to provide to the journalist for inclusion in the potential story in *The Australian* regarding GetSwift's agreement with NA Williams.[2531]

[2525] GSW.0019.0001.6844.
[2526] GSW.0019.0001.6844.
[2527] GSW.0019.0001.6844.
[2528] GSW.0019.0001.6844.
[2529] GSW.0019.0001.6844.
[2530] GSWASIC00010579.
[2531] GSWASIC00010579.

1881 At 9:21am, Mr Hunter responded to Ms Hughan's email (copied to Mr Macdonald) stating "Love it – thanks". Attached to this email was the most recent draft of the NA Williams Announcement. The announcement was dated 19 September 2017.[2532]

1882 At 9:43am, Ms Hughan sent an email to Messrs Hunter and Macdonald confirming that she would "send that info off now".[2533]

1883 At 10:20am, Ms Hughan sent an email to Mr David Swan, a journalist at *The Australian*, regarding a potential story about GetSwift's agreement with NA Williams. Attached to this email was the most recent draft of the NA Williams Announcement that had been provided to Ms Hughan by Mr Hunter.[2534] In this email, Ms Hughan stated:

> As promised -- here are some quotes for you from Bane on GetSwift's NA Williams deal, as well as what they want to do with the automotive sector in Australia. I've also attached the final ASX release due to go out on Tuesday. Plus a few pics because M+C. Let me know if there's any more info you need before Tuesday.[2535]

1884 On 12 September 2017, at 7:35am, Mr Macdonald instructed Mr Banson to release the First NA Williams Announcement to the ASX, to do so before 9am (that is, prior to market opening) and to have it marked as price sensitive.[2536] As I explained above (see [778]–[792] and [1597]), the ASX did not mark the First NA Williams Announcement as price sensitive because of the absence of information about revenue, which was then addressed by Mr Hunter by making amendments to the original announcement resulting in the Second NA Williams Announcement, which was marked as price sensitive.[2537]

1885 Messrs Hunter and Macdonald were disappointed that *The Australian* had decided not to publish the story about the NAW contract in hard copy print (but it did release an online article).[2538] On the day of the First NA Williams Announcement (that is, 12 September 2017), Mr Hunter sent an email to Ms Hughan (copied to Mr Macdonald), regarding the proposed article in which he stated:

[2532] GSWASIC00010573 attaching GSWASIC00010577.
[2533] GSW.0019.0001.6874.
[2534] GSW.0027.0002.8070 attaching GSW.0027.0002.8073, GSW.0027.0002.8074, and GSW.0027.0002.8075.
[2535] GSW.0027.0002.8070.
[2536] GSWASIC00010429 at 0430.
[2537] See GSWASIC00010408; GSWASIC00010367; GSWASIC00039320.
[2538] GSWASIC00010427.

> **Not good since we delayed the announcement just to give them first crack at it.** They ahve [*sic*] to find a way to make it up ti [*sic*] us if they want any more exclusives ... and they are coming.[2539]

1886 Ms Hughan replied stating, "[y]es I'm not very happy about it either because we had delayed the announcement and could have sent it off last week. Will let you know once/whether I get an explanation", to which Mr Macdonald replied: "Doesn't matter if it hits the press later today. It just need [*sic*] to hit!!!"[2540]

1887 The same day, Mr Hunter sent an email to Ms Hughan (copied to Mr Macdonald copied) regarding *The Australian* not publishing a print article on NA Williams, stating:

> We got a lot of blowback from people why this was not in the press especially with the historical results shown - more than 5m shares were traded in one day and the stock hit another record. So this puts a dark spot on the great job your group has done to date . This needs to now make a story before the weekend somewhere else other than motley - AFR etc...
>
> Please let us know what's being done and the results . We can't believe what a poor call the Australian made.

1888 Mr Hunter replied to his email, noting that *The Australian* had published an article online. Mr Macdonald responded to this email, stating:

> Guys can we please push the AFR hard to run a similar story like the Australian today. This is huge, a game changers for us and the industry, $10M of our stock was traded at one time the stock was up 35% to an all time high of $2.35!!!
>
> Not bad for a $0.20 IPO only 9 months ago.
>
> Hottest growth stock on asx [*sic*] so let's get this in the AFR today![2541]

1889 Later that day, Mr Macdonald followed up Ms Hughan and enquired whether there was any "traction with the AFR". Mr Macdonald stated:

> Story should be about our huge stock increase, heavy trading volume, incredible demand for stock and inking a transformational $138M deal that is making GetSwift emerge as one Australia's best known exports.[2542]

[2539] GSWASIC00010427 (emphasis added).
[2540] GSWASIC00010427.
[2541] GSW.0027.0001.7857.
[2542] GSW.0027.0001.7857.

1890 Ms Hughan responded, noting that *The Australian* ran the article online and that the AFR were unlikely to run the same story.

1891 On 13 September 2017, Mr Hunter sent an email to Ms Hughan (copied to Mr Macdonald) stating: "We have another big one coming - and it's going to be a scramble for it - going only to those who did well by us".[2543]

1892 On 21 September 2017, Mr Hunter sent an email to Ms Hughan regarding NA Williams, in which he stated:

> [W]e are looking for standalone articles like the one I sent you, with name recognition and not lost in dozens of other mentions. We are at that stage where we have to focus better in terms of our key events. Our Share price went up 25%, we announced a 138$m deal impacting a key market, a partnership with a US icon (84 years in business) to tackle a unique vertical and we get NO press about this? Unacceptable - need to step up the game a bit – its [*sic*] not like we are not feeding you good stories and there is nothing to pitch..[2544]

1893 This is another example of Mr Hunter's singular approach to communication.

1894 Messrs Hunter, Macdonald and Eagle adopted the same approach when it came to the Yum! and Amazon Announcements, thereby revealing their understanding of the relationship between the ASX announcements and the likely impact on GetSwift's share price. In an email dated 30 November 2017 to Mr Macdonald and Mr Eagle, Mr Hunter stated:

> Due to regulatory requirements we may be required to put this out today. Please review and comment. If in agreement then lets drop both [Amazon] and Yum at market open.
>
> Please let me know ASAP and the lets prep Zane. Will make our conversations with all investors rather interesting.[2545]

H.4.3 *Overarching observations*

1895 Like in respect of the s 674(2) case against GetSwift, it is convenient first to make some overarching observations in relation to the accessorial liability case against each of the directors, before turning to a more granular analysis of each of the alleged contraventions.

[2543] GSW.0027.0001.7857.
[2544] GSWASIC00009644; GSW.0019.0001.7082.
[2545] GSWASIC00053989.

Inferential reasoning

1896 It is first necessary to return briefly to the principles applicable to inferential reasoning. This is because the accessorial liability case, particularly to the extent it concerns the question of whether each director knew that the omitted information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price, is primarily about inferences. As Mr Halley, counsel for ASIC, stated in closing submissions:

> There's no … direct evidence, that the directors ever stopped and thought, "Well, when we're making these announcements, should we actually mention that they're still subject to trials, that the projections haven't been signed off by the counterparties; in fact, we've produced the projections ourselves," etcetera. The closest one gets, perhaps, is the termination for Fruit Box, where, at the board meeting, they did consider is it necessary to disclose the fact that Fruit Box has terminated the arrangement.
>
> …
>
> Now, one might say, well, what do you mean? How can you find actual knowledge if there's no direct evidence? And we say, well, that is the sort of task that comes up on an almost daily basis with criminal trials in the sense that there is often very little evidence of *mens rea* … rather, the court has to focus on intermediate factual findings to then determine whether or not the inference of fault or the element, or the *mens rea* in the old language, has been found, and we say that that should be no different for the purposes of establishing knowledge for the purposes of the materiality element to [s 674(2A)] contraventions, and we say in this case, your Honour does have evidence from which the following matters can be found.[2546]

1897 I have already referred to the foundational principle that when the law requires proof of any fact, the tribunal of fact must feel an actual persuasion of its occurrence before it can be found. However, it is also true that where there is no direct evidence of a fact that a party bearing the onus of proof seeks to prove, "it is not possible to attain entire satisfaction as to the true state of affairs": *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155 (at 169 per Mason J).

1898 In such a case, the law does not require proof to the "entire satisfaction" of the tribunal of fact: see *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 (at 141 per Tadgell JA, with whom Winneke P and Phillips JA agreed). Indeed, a party may advance a case relying on circumstantial evidence, on the basis that collectively viewed, a combination of proven facts can provide a sufficient basis for inferring the ultimate fact to be proved. A comprehensive

[2546] T1089.11–1090.4 (Day 17).

statement as to the sufficiency of circumstantial evidence in a civil case to support proof by inference from directly proved facts was given by the High Court in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 (at 5 per Dixon, Williams, Webb, Fullagar and Kitto JJ):

> Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while **in the latter you need only circumstances raising a more probable inference in favour of what is alleged.** In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise …
>
> (Emphasis added, citations omitted).

1899 In such a case, the question of whether an inference is open and can be drawn as a matter of probability is to be determined by considering the combined weight of *all* the relevant established facts, rather than by considering each fact sequentially and in isolation: *Marriner v Australian Super Developments Pty Ltd* [2016] VSCA 141 (at [75] per Tate ACJ, Kyrou and Ferguson JJA). As the Full Court of this Court stated in *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; (2019) 271 FCR 632 (at 674 [134] per Besanko, Bromwich and Wheelahan JJ):

> In assessing a circumstantial case, it is important to bear in mind that the facts ultimately to be proven are those that are in issue, and not necessarily all the circumstantial facts themselves. As Dawson J observed in *Shepherd v The Queen* (1990) 170 CLR 573 at 580, "[T]he probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately." This invites consideration of the combined weight of circumstantial facts, for it is the essence of a circumstantial case that the combined force of its components should be considered, and proof of some circumstantial facts may be affected by the court's assessment of other circumstantial facts: *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 535 (Gibbs CJ and Mason J). Courts may fall into error by compartmentalising circumstantial facts, rather than standing back and assessing the broader picture.

1900 I will deal in some detail below with how the *absence* of evidence from the directors has fortified the drawing of inferences in ASIC's case against each of the directors. However, with the principles relevant to inferential reasoning in mind, and with the necessity to bear in mind the seriousness and nature of the allegation sought to be proved (see s 140 of the *EA*), it is

necessary to turn to consider what is revealed by the factual narrative as it relates to the accessorial liability case.

The director's knowledge at a broad level

1901 *First*, there can be no serious dispute that Mr Hunter, Mr Macdonald and Mr Eagle each had knowledge of the contents of the Prospectus: each was a director at the time of GetSwift's IPO and the Prospectus contained a letter dated 26 October 2016 from Mr Hunter which was written on "behalf of the Board of the Company".[2547] As such, the available and compelling inference is that each of them must have appreciated that investors would act on the following information from the Prospectus: (a) GetSwift's revenue would be derived from entering into transactions with clients (especially Enterprise Clients with 10,000+ deliveries per month); (b) GetSwift was pursuing a high growth and expansion strategy; and (c) GetSwift would enter into contracts *following* a proof of concept or trial period. It follows that each of the directors was aware that investors would look to the announced contracts (especially those relating to Enterprise Clients) to determine the future revenue flow of GetSwift during their high growth and expansion strategy.

1902 *Secondly*, although each of the directors knew that the Prospectus identified a number of risks (i.e. clients not using the GetSwift Platform or otherwise terminating their contracts), they also knew, from the Prospectus, that investors had been told that contracts were entered into following a proof of concept or trial period. The directors must have known this would provide investors with confidence about the GetSwift Platform, and investors would have operated on the belief that clients had tested and had been sufficiently satisfied with the GetSwift Platform to proceed with an executed formal contract and had agreed to pay to use the GetSwift Platform.

1903 *Thirdly*, each of Messrs Hunter, Macdonald and Eagle were aware of and, as members of GetSwift's Board, had approved, GetSwift's Continuous Disclosure Policy, which set out procedures and measures designed to ensure GetSwift complied with its continuous disclosure obligations. They would have also been aware that the Prospectus stated the following in respect of the GetSwift's continuous disclosure obligations:

[2547] Prospectus (GSW.1001.0001.0478) at 0486.

> Once listed on the ASX, the Company will need to comply with the continuous disclosure requirements of the ASX Listing Rules to ensure that the Company discloses to the ASX any information concerning the Company which is not generally available and which a reasonable person would expect to have a material effect on the price or value of the shares. As such, this policy sets out certain procedures and measures that are designed to ensure that the Company complies with its continuous disclosure obligations.[2548]

1904 Relevantly, the Continuous Disclosure Policy stated (at [1.1(b)]) that GetSwift was committed to complying with the continuous disclosure obligations contained in the Listing Rules and the applicable sections of the *Corporations Act*.[2549] Further, the Continuous Disclosure policy set out the following as a "Guiding Principle" (at [2.1]):

> The Company will immediately notify the market via an announcement to the ASX of any information concerning the Company that a reasonable person would expect to have a material effect on the price of the Company's securities or influence an investment decision on the Company's securities.[2550]

1905 In relation to the review and release of announcements to the ASX (and media releases), the Continuous Disclosure Policy also stated that:

> ***3. Communication Protocols***
>
> 3.1 Reporting of Material Information
>
> (a) The Company's protocol in relation to the review and release of ASX announcements (and media releases) is as follows:
>
> (i) information is determined by the Board, Company Secretary or other employee of the Company as being of a type or nature that may warrant disclosure to the ASX;
>
> (ii) if not known by the Executive Director, all information should be reported to the Executive Director;
>
> (iii) the Executive Director will determine the nature and extent of the information and consult with the Board and Company Secretary to determine the form and content of any ASX Release;
>
> (iv) the Executive Director will agree on the text of the proposed release and will be responsible for ensuring that the Company establishes a vetting procedure to ensure that the announcements are factual and do not omit any material information. The Executive Director will also be responsible for ensuring that Company announcements are expressed in a

[2548] Prospectus (GSW.1001.0001.0478) at 0532.
[2549] Continuous Disclosure Policy (GSW.0016.0000.0001).
[2550] Continuous Disclosure Policy (GSW.0016.0000.0001).

clear and objective manner that allows investors to assess the impact of the information when making investment decisions. The Company Secretary may also be required to draft the release for review and will liaise with the Executive Director and Chairperson to ensure all announcements are made in a timely manner;

(v) depending on the nature of the release, the sensitivity of the information and the availability of the Board, the Executive Director and Chairperson will then determine whether the Board, as a whole, should be involved in the review of the proposed release ; and

(vi) the Company Secretary will then release the proposed release to the market, and ensure that the website is updated.[2551]

1906 As executive directors, each of Messrs Hunter and Macdonald were therefore obliged to act (and it can be inferred, knew that they were obliged to act) consistently with GetSwift's Continuous Disclosure Policy. Further, by publishing the Continuous Disclosure Policy to the ASX, GetSwift represented to the market that its executive directors would conduct themselves consistently with that policy. As Mr Eagle notes, he was not an executive director,[2552] but as a solicitor, and given his level of involvement of the affairs of the company, I have no doubt he was well aware of the Policy and what it required.

1907 *Fourthly*, each of the directors was aware that on or about 28 April 2017, the First Quantifiable Announcements Representation was made to investors, stating that arrangements would *only* be announced when the financial benefits were "secure, quantifiable and measurable": see [31] and [2182]–[2189] below. After the First Quantifiable Announcements Representation, in the absence of any evidence to the contrary, each director must have been aware that investors would be influenced by these statements in deciding whether to acquire or dispose of GetSwift shares. This is fortified by the fact that each director also had knowledge of the Second and Third Quantifiable Announcements Representations: see [32] and [2196]–[2200] below; and see [33] and [2206]–[2209] below, respectively.

1908 *Fifthly*, each of the directors participated in the drafting and/or review of the various ASX announcements and knew of the contents of those announcements, subject to the findings I made above at Part H.3. Of course, each director had varying roles and responsibilities in

[2551] Continuous Disclosure Policy (GSW.0016.0000.0001) at 0002.
[2552] ECS [113].

respect of the ASX announcements, including what the evidence establishes to be the more limited involvement of Mr Eagle. However, for the most part, each of the directors was aware of what was being presented to the market. As I noted above, it is reasonable to expect that directors of a listed company would, at the very least, review the final announcement that had been released to the ASX: see [1276].

1909 *Sixthly*, the evidence reveals that each of the directors, again to varying degrees and at various points in time, either together or with the knowledge of others, directed that the ASX announcements be released as "price sensitive". The documentary record also establishes that the directors sought to persuade the ASX to alter its procedures so that GetSwift's announcements would be marked as "price sensitive" and that GetSwift would be given advance notice if the ASX intended not to do so: see [1852]–[1868]. The compelling inference to draw is that Messrs Hunter, Macdonald and Eagle intended investors to consider the announcements which they were involved in having marked as "price sensitive" as ones which they regarded as influencing investors in making a decision to acquire or dispose of GetSwift's shares (although, as I explain below, it appears Mr Eagle's engagement in labelling announcements as "price sensitive" was more administrative than substantial). This is particularly the case in respect of Messrs Hunter and Macdonald, in respect of whom the evidence reveals calculated some of the ASX announcements to be released at points in time that would maximise the impact on investors' expectations and, in turn, GetSwift's share price.

1910 *Seventhly*, speaking at a level of generality, in cases where the directors had knowledge of, or an involvement in drafting, the client contracts, and were involved in preparing or authorising the ASX announcements, the inevitable conclusion to draw (in the absence of other evidence) is that they would have known that the announcements did not contain the relevant Agreement Information or the Projection Information. Similarly, upon becoming aware of the No Financial Benefit Information or the Termination Information, the directors would have been aware that an announcement had not been made to the ASX to disclose that information.

1911 *Eighthly*, to the extent that the Agreement Information contraventions are alleged against Mr Hunter, Mr Macdonald and Mr Eagle, and where the evidence reveals they were involved in the drafting, negotiation, preparation and authorisation of the client contracts and ASX announcements, the inference I would draw is that they knew the information from the client contracts that was not contained in the ASX announcements had not been disclosed to the ASX. Indeed, the evidence reveals that almost all agreements were negotiated on a confidential basis,

indicating that the directors knew that information not contained in the ASX announcements was not communicated to the market. Further, to the extent the directors contend they were entitled to rely upon the generic information in the Prospectus or Appendix 4C disclosures as a basis to assert the information regarding trial periods and termination was generally available, that contention should also be rejected. *First*, the directors were aware of what was communicated to investors in the Prospectus, including the First Agreement After Trial Representation and, as I detail with respect to the misleading and deceptive conduct case, the Second Agreement After Trial Representations and the First, Second and Third Quantifiable Announcements Representations: see [2175]–[2176] below. *Secondly*, as I have stated, the information regarding trial periods and termination said to be generally available from, among other things, the Prospectus is not equivalent to the information ASIC contends forms part of the omitted information: the former relates to general risks associated with GetSwift's business model; the latter relates to the risks associated with specific agreements that were of an entirely different magnitude and nature.

1912 Broadly speaking, it follows from each of the above matters that Messrs Hunter, Macdonald and Eagle had knowledge that investors expected client contracts would be announced once clients had completed a proof of concept or trial period and, after the First Quantifiable Announcement was made, that contracts were being announced at a point in time when the financial benefits associated with them was secure, quantifiable and measurable. Within this context, the natural inference is that to the extent they knew of the content of the relevant agreements and announcements, Messrs Hunter, Macdonald and Eagle knew that the inclusion of information in client contract announcements which stated that, among other things: (a) clients had not yet commenced a trial or were still in a trial period: (b) that the exclusive term of the contracts were subject to the completion of the trials and subject to termination: or (c) that there were important qualifications to be placed on the projections as to deliveries and revenue, would influence investors in making a decision whether to acquire or dispose of shares in GetSwift.

1913 These broad overarching statements provide a foundation for the assessment of the liability of each director. However, as submitted quite forcefully by each of the defendants, one must give consideration to their differing roles in the overall narrative or, as Dr Higgins SC, counsel for Mr Macdonald, described it, the "division of labour" within the top level of GetSwift. It is therefore necessary to give particularity to the role and knowledge of each director before examining the contraventions *seriatim*.

Giving particularity to the role and knowledge of each director

1914 As would be evident from the reasons this far, a hierarchy existed among the directors, particularly in respect of their involvement in directing what was to be announced to the ASX and at what time; Mr Hunter takes gold, Mr Macdonald a close silver, and Mr Eagle a few paces behind with bronze. However, despite what might appear to be, to adopt an Americanism, a clear "power dynamic", each of the directors does not now shy away from pointing the finger. In closing submissions, Mr Hunter says, in substance, that in the discharge of his duties he relied upon Mr Eagle; Mr Macdonald says, in substance, that he relied upon Messrs Hunter and Eagle; and Mr Eagle says, in substance, that he relied upon Messrs Hunter and Macdonald (although it should be noted that these submissions are not made in terms of "reliance", given no reliance defence was pleaded or run by any of the directors). It is therefore first convenient to examine the "division of labour" before descending into the minutiae of the alleged contraventions. In doing so, I will make overarching conclusions as to the *modus operandi* of each director. These findings will also be relevant to the breach of directors' duties contraventions.

Mr Hunter and Mr Macdonald

1915 Both Mr Hunter and Mr Macdonald contend that they were entitled to rely upon Mr Eagle. Mr Hunter asserts that he is not seeking to "sheet home" responsibility for the contraventions to Mr Eagle. Rather, he says that, in what "one might have thought was unremarkable" in many cases, the ASX announcements "were reviewed at the time by the company's general counsel prior to their being released" and that he and Mr Macdonald "caused" the ASX announcements "to be reviewed by the company's general counsel or otherwise knew he had done so".[2553] Mr Macdonald similarly contends that "[i]n each event, Mr Eagle effectively advised GetSwift and its board that there was no substantial legal risk arising out of the relevant announcement".[2554]

1916 These submissions might be said to find artificial support from the description of each director in the Prospectus, which described Mr Eagle as "admitted as an attorney in New York, US and as a solicitor in New South Wales, Australia" and stated that he had "extensive experience in

[2553] HCS at [15]–[16].
[2554] MCS at [127].

providing top-level global and domestic legal services to emerging growth and mid-stage companies as well as to larger publicly held multinational corporations".[2555] However, I do not find that these submission withstand scrutiny; nor do they in any way reflect the reality of the relationship between the directors or the nature of the decisions that were required to be made.

1917 *First*, the information that GetSwift, Mr Hunter and Mr Macdonald failed to disclose and which gives rise to the contraventions alleged in this proceeding, is information of which they were each aware (subject to the qualifications contained in Part G.1 above) by reason of their day-to-day activities as executive employees of GetSwift. Mr Hunter and Mr Macdonald do not identify how they placed any reliance on Mr Eagle or what "advice" they received from him. Nor do they point to the terms or manner in which Mr Eagle was delegated any particular function or how he was entrusted in any way. Further, the mere reference to the retainer with Mr Eagle's firm, Eagle Corporate Advisers, takes the matter no further in circumstances where the ASX announcements were approved by each of them.

1918 The highest the evidence gets is that Mr Eagle made amendments and edits to some of the ASX announcements, and otherwise "approved" others without comment. Indeed, I reject the submissions that, for example, in relation to the CBA Announcement, by replying "[n]o comments here" (see [361]), Mr Eagle was advising that "there was no substantial risk of a legal contravention by GetSwift arising from the terms of the CBA Announcement".[2556] In so far as a more general case is being advanced by Messrs Hunter and Macdonald of reliance on Mr Eagle, there is no evidence that they ever asked Mr Eagle, or otherwise made proper enquiries with him, to advise as to whether the ASX announcements complied with GetSwift's disclosure obligations. Indeed, the reality appears to be the contrary. As the factual narrative reveals (at [1808]–[1894]), while Mr Eagle was copied to a number of communications, it was Mr Hunter and Mr Macdonald who were calling the shots as to the content and timing of the announcements. Certainly, the circulation of draft announcements occurred, but any input of Mr Eagle and Ms Gordon was an "optional extra".

[2555] Prospectus (GSW.1001.0001.0478) at 0493.
[2556] MCS at [242].

1919 Indeed, the real role of Messrs Hunter and Macdonald is captured by various aspects of the evidence, including the following:

(1) The Company formally adopted a Continuous Disclosure Policy on 26 October 2016.[2557] The Continuous Disclosure Policy was published to the market by lodging it with the ASX and it was available on the Company's website. The Continuous Disclosure Policy specified clearly the role and function of the non-executive director in the GetSwift's operations, delegating responsibility to the "Executive Director" for the following: (a) determining information that warrants disclosure (that is, material information) (cl 3.1(a)(iii)); (b) agreeing the drafts of associated ASX announcements (cl 3.1(a)(iv)); (c) ensuring there is a vetting procedure so that the announcements are factual and do not omit any material information (cl 3.1(a)(iv)); and (d) ensuring that announcements are expressed in a clear and objective manner that allows investors to assess the impact of the information when making investment decisions (cl 3.1(a)(iv)). However, the Continuous Disclosure Policy also stated it was at the discretion of the "Executive Director" and "Chairman" as to whether the Board, as a whole (including Mr Eagle as non-executive director), should be involved in review of any ASX release (cl 3.1(a)(v)).

(2) On 2 February 2017, Mr Eagle agreed with Mr Mison's suggestion as to a process for releasing ASX announcements in an email exchange which included Messrs Hunter and Macdonald, Ms Gordon and Ms Stephanie Noot.[2558] In that email Mr Eagle said:

> Let's use this experience to get the right routines in place for our announcements. Night before is good (particularly as a heads-up for Scott's early morning on the west coast), and for Jamila and I to review what's going out. Always helpful for a fresh pair of eyes to pick up any errors, takes some of the burden off of Joel and Bane.

(3) Despite this, Mr Mison's evidence was that the first time he received proposed announcements to be submitted to the ASX was when either Mr Hunter or Mr Macdonald, who would instruct him to lodge it either immediately or on the next day. If it was not copied to other directors, he would circulate the announcement to the other

[2557] GSWASIC00030586.
[2558] GSWASIC00027406.

directors before then lodging it.[2559] He also stated that Mr Hunter and/or Mr Macdonald would typically give him instructions as to whether the announcement should be marked as "price sensitive", which occurred in relation to Fruit Box and CBA. [2560]

(4) Mr Mison recalls that Messrs Hunter and Macdonald specifically directed that ASX announcements were to be approved by them, and not by Mr Eagle, Ms Gordon or anyone else.[2561] That specific direction was also made in an email dated 3 April 2017 from Mr Hunter to Mr Mison, copied to Mr Macdonald, which Mr Mison identified during his cross-examination, and which was in these terms:

> Yeah lets [*sic*] not screw up tomorrows release or I will not be a happy person.
>
> Any questions ask them now – anything goes not as directed there is no excuses I am willing to accept.
>
> 1. Release at 8am Tuesday Sydney time – BEFORE TRADING STARTS
> 2. PRICE SENSATIVE [*sic*]
> 3. **Content as directed and approved by Joel – NOT Brett, Jamila or anybody else.**[2562]

Notwithstanding that this email concerned Crosstown Doughnuts, in cross-examination Mr Mison said: "Yes, but that's – that's the way it was instructed for all announcements, not just particularly this announcement, but that that's the way they want it for all announcements".[2563]

(5) With regard to the drafting of the substantive content of the announcements, Mr Hunter was the principal draughtsman of GetSwift's ASX announcements. In an email dated 30 March 2017 from Mr Macdonald to Mr Hunter, Mr Macdonald wrote (see [1824]):

> We almost need someone full time to be managing this so we don't drop the ball if we are travelling and signing the next big deals: someone to copy write the announcements and chasing them down, as well as reaching out to new potential partners to sign with.

Mr Hunter's response was:

> I need to do this – it's s [*sic*] very specific skill set. Not a problem. Will get on

[2559] Mison Affidavit (GSW.0009.0036.0001_R) at [33].
[2560] Mison Affidavit (GSW.0009.0036.0001_R) at [35]; GSWASIC00025702; GSWASIC00025703 attaching GSWASIC00025688; GSWASIC00023516 attaching GSWASIC00023517.
[2561] Mison Affidavit (GSW.0009.0036.0001_R) at [36]; T283.22–27 (Day 4); T285.1–4 (Day 4).
[2562] MFI3 (emphasis added); T283.43–284.14 (Day 4).
[2563] T285.1–4 (Day 4).

it when we meet/get back to NY

(6) In an email dated 4 July 2017, Mr Kiki of Aesir Capital sent an email to Messrs Hunter and Macdonald that said, among other things:

> I would like to start vetting all market announcements before they hit the tape. Today's announcement could have benefitted with a couple of aesthetic brush ups, a nice graph, etc.
>
> I am your guy for stuff like this so run these things through me so we can have maximum effect.
>
> Let me know if it is Brett or Scott that I need to work with on this.[2564]

(7) Mr Hunter responded to Mr Kiki's email, copied to Mr Macdonald with "you would work with *me* on it" (emphasis added), to which Mr Kiki wrote "Even better….Target should be perfection every time. Not just 'good enough'". Mr Hunter's reply email to Mr Kiki (copied to Mr Macdonald) stated: "Target should be getting results, perfection is tertiary."[2565]

(8) With regard to the authorisation of announcements for submission and release by the ASX, on 25 August 2017, an announcement was released by ASX to the market to the effect that Mr Hains had been appointed as company secretary of GetSwift and that Mr Mison had resigned as company secretary.[2566] Confirmation that the announcement had been made was sent to Messrs Hunter and Macdonald by Ms Cox.[2567] It is convenient to set out the chain of emails like a drama script or perhaps, given the way in which people in the 'tech' world appear to write, a text message:

> Mr Hunter: Am I going crazy? Where is the approval from us to release this to the market ?!!
>
> Ms Cox: Yes, I understand that it should have gone by you.
>
> We had to report to ASX that Scott had resigned on Wednesday. It's now Friday and we can't delay that notice any more.
>
> This is only a stop gap to ensure we don't breach ASX reg's [*sic*]. One you have found a new co secretary then we can do a new release.
>
> Mr Hunter: Let me make this crystal clear – **we have NEVER released**

[2564] GSWASIC00017114.
[2565] GSWASIC00017114.
[2566] GSW.1001.0001.0792.
[2567] GSWASIC00012280.

anything EVER without Joel or mine [*sic*] approval or review first. This is such a disappointing move and could not come at a worse time. Who has access ti [*sic*] our portal?

This is a serious breach of protocol and authority.

…

Mr Hunter: Who approved this?

You mean to tell me that we have given key access to someone without either the chairman or [managing director] approval? Well that certainly is working out well. While we are at it I am surprised we did not give someone access to our bank accounts without our expressed [*sic*] approval.

Two questions before I make an executive decision and I want names because I doubt it was ghosts:

1. Who wrote the notice release?

2. Who saw the notice before it was released and who approved the release?

Ms Cox: I asked the CFO to write and the [*sic*] release before close of market. If it was left until Monday that would be 6 days without the market knowing.

Mr Hunter: Are you serious?! Who gave you the authority to release anything to the market?

Ms Cox: would you like to talk?

Mr Hunter: No, its 330am and I woke up because I sensed something was wrong. You have made an incredible misjudgment [*sic*] and overstepped your bounds. **I am flabbergasted that you thought it was ok to release anything on the ASX without Joel and my approval.**

Ms Cox: Maybe I misunderstood.

I got the impression from Brett that we needed to do something today.

Mr Hunter: **Irrelevant – the point here is wether [*sic*] we needed to do something or not, neither Joel or myself saw or approved this**.

It would have taken you 3m to check with us and you did not. **You know that any market release have [*sic*] to be vetted by us.**

I am at a loss for words.[2568]

[2568] GSWASIC00012280 (emphasis added).

(9) The following day, Mr Macdonald sent an email to Ms Cox, Mr Hunter and Mr Eagle with the subject line "Announcement". Mr Macdonald's email was in the following terms:

> Guys,
>
> After last weeks [*sic*] **complete f[**]k up** regarding this cosec announcement I want to **reiterate company policy**:
>
> **NO ASX announcements are to be released & No service provider / employee appointment decisions are to be made without Bane and/or my approval**
>
> **There are always broader strategies at play that you will not be aware of**, hence management approval is needed to ensure the appropriate actions and effective actions can then be taken that are in the best interests of the company and that have **considered the broader strategic picture**.
>
> **I want to make sure at all times from now on that the company is never ever compromised due to individuals not following correct protocol.**
>
> Sue – in the interim can you make sure the CFO is not [*sic*] release anything without our approval.
>
> **This announcement completely derailed what we were planning to do on a number of levels.**
>
> **Clear?**[2569]

1920 To assert, in the light of the above evidence and their decision not to get into the witness box to explain away the tenor of the documents, that Messrs Hunter and Macdonald relied on Mr Eagle in any substantial way in deciding the substance of what to disclose, is a risible contention. He was a box to tick when it was convenient, and one to put to one side when it was not. Mr Hunter and, to a lesser extent, Mr Macdonald, ruled the roost.

1921 For completeness, I should note that to the extent positive defences are run by Mr Hunter and Mr Macdonald pointing to the fact that Mr Eagle was copied into the circulation of draft announcements, and by providing comments or otherwise not responding, he was approving those announcements in his legal capacity, they should be rejected for the following reasons:

(1) As I alluded to above, there is no evidence that either of Messrs Hunter or Macdonald ever instructed Mr Eagle to review and advise on any of the proposed ASX announcements in the manner alleged in the amended defences. Further, there is no

[2569] GSWASIC00039863 (emphasis added).

contemporaneous document which records such a specific instruction from either of Messrs Hunter and Macdonald to Mr Eagle. There is also no evidence recording any standing instruction or mandate from Messrs Hunter or Macdonald for Mr Eagle to review and advise on the proposed ASX announcements in the manner and to the extent alleged by Messrs Hunter or Macdonald.

(2) In each of the emails pleaded, the instruction to review, comment or query on the proposed announcement is to the directors of GetSwift, not to Mr Eagle alone. I conclude, in the absence of evidence to the contrary, that Mr Eagle was primarily being asked to review any proposed announcements in his capacity as a non-executive director of GetSwift. Even if he was reviewing the announcements in his capacity as a solicitor, his opportunity to comment was more of a formality; most of the time, his comments were not accepted by Messrs Hunter and Macdonald: see, e.g., [419], [428], and [906].

(3) Mr Eagle's lack of a response to an email from Messrs Hunter and Macdonald in relation to a proposed ASX announcement should not be accepted by the Court as evidence that he had reviewed the ASX announcement in the manner and to the extent alleged. First and foremost, this is because there was no standing direction that Mr Eagle was required to review and provide comment on an ASX announcement before its release. Further, two examples indicate why his imprimatur should not be taken to have been secured by silence:

    (a) In respect of the CITO Announcement,[2570] Mr Macdonald circulated his email attaching the proposed CITO Announcement to Mr Eagle and others at 8:33am on 22 May 2017 stating that the proposed announcement would be submitted to the ASX at 9am the next day, before correcting himself, one minute later, with "Sorry – I meant this 9am this morning": see [532]. Even assuming Mr Eagle checked his emails, he was given 26 minutes from the time of Mr Macdonald's second email to review the draft announcement and provide any legal advice on it. There is no evidence Mr Eagle was given any prior warning that the proposed CITO Announcement was to be submitted for release that morning. In any

[2570] Hunter Defence at [359(e)]; Macdonald Defence at [297]–[299].

event, such time was unreasonable and insufficient for either of Messrs Hunter or Macdonald to have reasonably formed a view it had been subjected to legal analysis and approval in the manner alleged.

(b) In respect of the Fantastic Furniture and Betta Homes Announcement,[2571] Mr Eagle on an aeroplane flying back from Europe when Mr Mison circulated his email attaching the draft announcement: see [661]. Messrs Hunter and Macdonald both knew that Mr Eagle was due to arrive in Sydney on the day the announcement was to be released: see [666].

1922 *Secondly*, and in any event, the questions which Mr Hunter and Mr Macdonald were required to determine in order to discharge their duties and avoid any contravention of the law by GetSwift were fundamentally commercial questions, not legal questions. They were required to consider, having made each of the ASX announcements, whether each announcement disclosed all information that was relevant to that announced contract, of which they were aware, which was not generally available and which if it were generally available, would be information likely to influence an investor's decision as to whether to acquire or dispose of shares in GetSwift. These were, in effect, commercial questions calling for common-sense answers, which Mr Hunter and Mr Macdonald were well placed, indeed often better placed, to provide.

Distinguishing Mr Macdonald from Mr Hunter?

1923 From the outset, I note that I accept the factual narrative above (see [1808]–[1894]) reveals that Mr Macdonald demonstrated a less intense focus on the relationship between the ASX announcements, share price and investor expectation compared to Mr Hunter. As such, it is necessary to address a number of overarching submissions that are relevant to the case against Mr Macdonald before turning to the minutiae of each contravention.

1924 *First*, in respect of his involvement in marking announcements as price sensitive, Mr Macdonald submits that the available evidence on a whole indicates that it is at least as likely as not that he was doing "no more than acting in accordance with the general approach

[2571] Hunter Defence at [359(f)]; Macdonald Defence at [309]–[311].

promoted by Mr Hunter" and did not "independently turn his mind to the question of whether the information in any of the announcements was material".[2572] He submits that the evidentiary record is consistent with an apparent division of responsibilities within GetSwift in which Mr Macdonald assumed responsibility for operational matters, particularly in relation to winning and "on boarding" new clients, while Mr Hunter was responsible for, among other things, the content of, and approach to, ASX announcements. Mr Macdonald further points to how Mr Hunter "forcefully at times" directed other members of the board to ensure that his wishes as to timing and price sensitivity were adhered to, sought to give directions as to the deployment of announcements having regard to the potential impact on the GetSwift share price, and regularly communicated to Mr Macdonald, and others, his views and directions as to the timing of ASX announcements.[2573] For example, in relation to the Fruit Box Announcement, Mr Macdonald highlights that it was only after being prompted by Mr Hunter that he directed Mr Mison to release the ASX announcement as price sensitive: see [164]–[169] and [1816].

1925 Further, it is said that given Mr Hunter and Mr Macdonald's respective levels of corporate experience, Mr Macdonald's responsibility for operational and technology matters, and the fact that Mr Eagle, who professed extensive legal experience, sat on the board and was privy to almost all of the relevant correspondence about the release of announcements and their designation as price sensitive, it was not incumbent on Mr Macdonald to challenge Mr Hunter's beliefs as to the designation of ASX announcements as price sensitive, where these were expressed to be so with the knowledge of, and without objection from, Mr Eagle.

1926 From these matters, Mr Macdonald submits that any of his directions to Mr Mison, Mr Banson and Mr Vaughan that the announcements be marked as price sensitive should be given little to no weight in the assessment of whether Mr Macdonald was aware that the relevant announcement was in fact material in the manner required under s 674(2)(c)(ii). Similarly, it is said that *a fortiori*, where Mr Hunter directed that the relevant announcement be marked price sensitive upon release, Mr Macdonald's knowledge of that direction is not a sufficient basis to find that he was "aware" that the information in the announcement was material in the manner described in s 674(2)(c)(ii).

[2572] MCS at [49]–[50].
[2573] MCS at [38].

1927 *Secondly*, Mr Macdonald says that there is little evidence of him issuing directions and expressing views as to the appropriate time at which announcements should be released, and that there is no evidence to suggest he was unduly focussed on the relationship between the ASX announcements and GetSwift's share price. To the contrary, Mr Macdonald contends that he simply deferred decisions to Mr Hunter concerning timing and that he simply went along with Mr Hunter's proposals. For example, in response to emails between Mr Hunter and Ms Hughan concerning delays in the publication of a story regarding the NA Williams Agreement in *The Australian*, which ultimately resulted in a delay in the release of the First NAW Announcement, Mr Macdonald stated that it "[d]oesn't matter if it hits the press later today. It just need [*sic*] to hit!!!": see [1885].[2574]

1928 I accept, from the evidence, that some of the time, Mr Macdonald was following Mr Hunter's lead in marking the ASX announcements as price sensitive. But this was not always the case, and nor does it demonstrate a border lack of appreciation about the significance of marking the announcements as price sensitive. Mr Macdonald was no naïf. Dr Higgins, counsel for Mr Macdonald, emphasised that there is a need to look at each announcement *seriatim*, which I accept.[2575] However, the broad characterisation that Mr Macdonald was "not engaging with the ASX announcements in any substantial way",[2576] or that he was not cognisant of the relationship between the ASX announcements and GetSwift's share price, puts the matter far too highly and should be rejected. A number of reasons support this conclusion.

1929 *First*, along with being copied to almost all the emails sent to the ASX requesting that ASX announcements be labelled as price sensitive, there are a number of instances where Mr Macdonald echoed such a direction or gave such a direction himself. For example, after sending the Fruit Box Announcement to Mr Mison for release, he followed up noting in respect of the Fruit Box Announcement, "[o]bviously need to tag as price sensitive as well": see [169] and [1816]. A more detailed example concerns an email that Mr Macdonald sent Mr Vaughan of 24 October 2017 about the Johnny Rockets Announcement. It is evident that Mr Macdonald substantively engaged with the question of whether the information was price sensitive because he ultimately concluded "that [the announcement is] material and is market sensitive", by

[2574] MCS at [44].
[2575] T1168.15–16 (Day 18).
[2576] T1166.11–12 (Day 18).

reason of stating that "the delivery count will be in the millions": see [822]–[823] and [1864]. I do not accept Mr Macdonald's contention that "[t]his does not display substantive engagement by Mr Macdonald on the question of whether the Johnny Rockets Announcement was price sensitive", that he ultimately turned out to be wrong as to its price sensitivity, or that the email was sent only after Mr Vaughan objected to the announcement being marked as price sensitive.[2577] Rather, to my mind, this email demonstrates that Mr Macdonald himself expressed concern about price sensitivity and that he did not always act on Mr Hunter's instructions, but exercised independent judgment as to the materiality of the ASX announcements.

1930 *Secondly*, I accept that while Mr Macdonald may have deferred some decisions to Mr Hunter concerning the timing of announcements, there is still evidence suggesting that he was acutely aware of the relationship between the timing of an announcement and GetSwift's share price. Not only was he copied to a number of emails from Mr Hunter impressing the need for strategy in timing and delivery of ASX announcements (see [1843] and [1846]–[1850]), but he was actively involved in the strategic decisions of which announcements to push at what time, as evidenced when he exchanged a list of proposed announcements with Mr Hunter, and then agreed with the order to push them: see, e.g., [1850]. Indeed, on the evidence as it stands, I am amply satisfied that Mr Macdonald, in his own right, recognised the importance of ASX announcements in engendering investor expectations and that their timing was critical to maximising share price impact.

1931 *Thirdly*, there are a number of communications which fortify me in the conclusion Mr Macdonald was not acting as the mere follower of Mr Hunter, but was acutely aware of the forces at play. Four examples suffice.

(1) The *first* is an email from Mr Macdonald to Ms Gordon on 28 March 2017, expressing concern about how the delayed CBA agreement had "caused a negative impact on [GetSwift's] share price" and that it had "cost us more than $13M in value – let me repeat this – a negative $13M hit": see [1822]. As one might expect, Mr Macdonald attempts to downplay the significance of this email on the basis that it did not mention

[2577] MCS at [48].

any ASX announcement, that his reference to the share price was consistent with a reasonable concern held by a director in relation to finalising a potentially valuable transaction for GetSwift and that it does not indicate any improper focus on his part, and that in effect, Mr Hunter had already had a "dig" at Ms Gordon, meaning this merely demonstrates Mr Macdonald's deference to Mr Hunter's experience on matters relating to corporate strategy.[2578] I reject these submissions. Apart from its unfortunate tone, it indicates that Mr Macdonald's commercial concerns were not simply on the operational and technology aspects of GetSwift's business, but as to how those matters were impacting the expectations of investors and GetSwift's share price.

(2) The *second* is an email that was sent by Mr Macdonald to Mr Eagle and Mr Hunter of 23 August 2017, in which Mr Macdonald expressed a view that Mr Mison had lied about his ability to mark the announcement as price sensitive. Mr Macdonald stated:

> This thread from Scott confirms he lied to me on the phone today.
>
> 1. He said he can't tag or even make a suggestion to tag any announcement as price sensitive. Bullshit
>
> 2. I spoke to him at 10:12am Sydney time asking why our announcement hadn't been released yet when we had all morning. He said he had submitted our latest announcement to the ASX already. I didn't believe him so I emailed the SX< whereby Andrew from ASX replied in writing that Scott didn't submit the announcement until 10:19am (which was 5 minutes after I got off the phone yelling at him). After three stalling attempts by Scott (claiming URL's can't be used in announcements, not tagging as market sensitive, delayed submission), I think we have clear evidence that Scott blatantly **stalled the release of our announcement this morning which has had an impact on our share price**.[2579]

Although Mr Macdonald attempts to justify this email by submitting (in the absence of any evidence from him) it was written in anger and motivated by his frustration that Mr Mison had lied,[2580] to my mind, it reinforces the way in which Mr Macdonald appreciated the perceived link between the release of ASX announcements and influencing GetSwift's share price, along with the significance of marking announcements as price sensitive.

[2578] MCS at [45].
[2579] GSWASIC00012665 (emphasis added).
[2580] MCS at [46].

(3) The *third* is an email that Mr Macdonald sent to Mr Eagle on 7 October 2017 concerning Mr Eagle's performance in respect of his KPIs. The email stated:

> Just wanted to touch base regarding some KPIs/Matters that are slipping on your end and need to be taken care of asap:
>
> …
>
> ASX formal reply regarding – why our 1m, and 2m announcements were **marked as market sensitive** but 3m wasn't?
>
> The retainer and options package you are on is worth over [$2 million] and we need to see momentum for this on all fronts …
>
> Unfortunately I keep getting updates with little progress made in key areas and need to understand whether we should make alternative arrangements for another [General Counsel] if you are unable to keep up with our aggressive requirements? Please let me know as we are entering into a **really important phase** and need all hands on deck.[2581]

(1) The reference to releasing announcements as price sensitive further demonstrates that Mr Macdonald was conscious and concerned to ensure everything was being done to mark announcements as price sensitive. Further, it can be inferred that the "important phase" referred to by Mr Macdonald was the October Appendix 4C, ahead of the Second Placement.

(4) *Finally*, the email extracted above (at [1919]) concerning the "complete f**k up" of announcing that Mr Hains had been appointed as company secretary of GetSwift and that Mr Mison had resigned as company secretary is further illustrative of Mr Macdonald's close involvement in dictating what was occurring at GetSwift and when. Critically, it stated:

> **There are always broader strategies at play that you will not be aware of**, hence management approval is needed to ensure the appropriate actions and effective actions can then be taken that are in the best interests of the company and that have considered the broader strategic picture.
>
> …
>
> **This announcement completely derailed what we were planning to do on a number of levels.**[2582]

1932 I am therefore satisfied that Mr Macdonald well understood the connexion between the ASX announcements, investor expectations and GetSwift's share price. I am also satisfied that,

[2581] GSWASIC00067353 (emphasis added).
[2582] GSWASIC00039863 (emphasis added).

although he was less blatant about it, Mr Macdonald was *ad idem* with Mr Hunter about the importance of imparting good news to the market at opportune times and the significance of marking ASX announcements as price sensitive.

1933 Before moving on it is convenient to deal with a further submission made by Mr Macdonald concerning his alleged reliance upon the "review" conducted by PwC, which relates the continuing nature of the contraventions alleged. On 29 January 2018, GetSwift retained PwC to review GetSwift's continuous disclosure compliance. In a letter to the ASX, Mr Eagle stated:

> Dear Ms So,
>
> GetSwift Limited ("GSW") suspension from quotation - continuation pending announcement
>
> We refer to ASX's announcement on 25 January 2018 regarding the suspension of GetSwift Limited (the **Company**) from official quotation.
>
> The Company has today engaged PricewaterhouseCoopers (**PwC**) to review the Company's continuous disclosure compliance. As part of that engagement, PwC will also assist the Company in its preparation of a more comprehensive market update, which will address questions raised by ASX in its correspondence with the Company as well as other commentary in the market. The Company will be issuing its Appendix 4C (Quarterly Report) on Wednesday of this week with the market update to follow by the end of the week.
>
> Until the market update is released, the Company requests that its current suspension from official quotation be maintained. The Company will respond to questions raised by ASX in addition to providing the market announcement.[2583]

1934 On 16 February 2018, Ms Reid of PwC sent an email to the ASX stating:

> I have attached GetSwift's market update, with its letter to ASX confirming compliance with listing rule 3.1.
>
> Subject to your confirmation, we would like to upload the market update (and then letter, if appropriate) to the announcements platform.[2584]

1935 One of the attachments to PwC's email was a letter from GetSwift to the ASX.[2585]

1936 On 19 February 2018, GetSwift sent a letter to the ASX that was signed by Mr Macdonald (**19 February 2018 Letter**) stating that:

> GetSwift advises that PricewaterhouseCoopers (**PwC**) has now completed the initial

[2583] GSWASIC00001660 attaching GSWASIC00001661.
[2584] GSW.1019.0002.0064 attaching GSW.1019.0002.0073, and GSW.1019.0002.0075.
[2585] GSW.1019.0002.0075.

> stage of its review.
>
> That initial stage involved PwC reviewing GetSwift's ASX announcements and Enterprise Client contracts referred to in its announcements, including all of those Enterprise Client contracts subject of ASX query and recent media commentary, to assist GetSwift in determining whether or not it is compliance with listing rule 3.1.
>
> While PwC is continuing its engagement, GetSwift is comfortable that no further disclosure will be required and accordingly, is happy to now confirm that it is in compliance with listing rule 3.1.
>
> GetSwift continues to work with PwC in relation to compliance with the Listing Rules.
>
> This letter has been authorised and approved by GetSwift's board and in accordance with its continuous disclosure policy.[2586]

1937 The 19 February 2018 Letter was in identical terms to the letter attached to Ms Reid's email to the ASX dated 16 February 2018. Mr Macdonald submits that by instructing that the 19 February 2018 Letter be published, Ms Reid implicitly endorsed its contents and indicated to the ASX that the contents of the 19 February 2018 Letter were accurate.[2587] It is said that it can safely be inferred from the fact that Mr Macdonald signed the 19 February 2018 Letter that he was aware of it contents, that Ms Reid had provided it to the ASX on 16 February 2018 and that she sought that it be published (and therefore considered its contents to be accurate).[2588] This is used as the basis for the submission that Mr Macdonald thereafter conducted himself consistently with the fact that PwC had satisfied itself that no further disclosure was required and that GetSwift was in compliance with Listing Rule 3.1.[2589]

1938 The PwC Report was the subject of some debate.[2590] Perhaps reflective of the cogency of the argument, the assertion that PwC "implicitly endorsed" the contents of the 19 February 2018 Letter was watered down in oral submission to the contention that PwC "impliedly represented that it did not consider the contents of that letter to be misleading."[2591] To the extent that Mr Macdonald contends PwC had given its imprimatur (or even its nihil obstat) to the contents of the 19 February letter, I disagree. PwC's covering email stated it "attached *GetSwift's market update*, with *its* letter to ASX confirming compliance with listing rule 3.1" (emphasis added). The use of the possessive form indicates PwC was conveying to the ASX that the attachment

[2586] GSW.1019.0002.0075 (emphasis in original).
[2587] GSW.1001.0001.0112.
[2588] MCS at [135].
[2589] MCS at [136].
[2590] T1018.37–1022.16 (Day 15); T1179.43–1181.35; T1209.44–1210.6 (Day 18).
[2591] T1180.6–19 (Day 18).

was GetSwift's position. The letter signed from GetSwift was caveated in similar terms. It commenced by stating that GetSwift was advising the ASX that PwC had "completed the initial stage of its review", set out what the review entailed, and concluded by noting that "[w]hile PwC is continuing its engagement, *GetSwift is comfortable* that no further disclosure is required and accordingly, is pleased to confirm that it is in compliance with listing rule 3.1" (emphasis added). While I accept the letter stated that "GetSwift continues to work with PwC in relation to compliance with the Listing Rules", what is plain is that the ASX was being informed of GetSwift's comfort, not PwC's. In the absence of any evidence whatsoever concerning the letter or GetSwift's engagement with PwC (of which there is none), I am not satisfied this letter confirms an understanding on the part of PwC as to the correctness or otherwise of the representation made. Indeed, as the 19 February 2018 Letter reveals, PwC was still "continuing their engagement". In any event, even if PwC was representing something, in the absence of evidence, I do not know and will never know what GetSwift told PwC, which may or may not have assisted someone within PwC supposedly holding a view as to whether or not and in what respects GetSwift may or may not have complied its continuous disclosure obligations.

1939 I do accept the fact of the retention of PwC goes to the question of onus in proving a knowing involvement in the s 674(2) contravention, and is relevant to the reasonable discharge of Mr Macdonald's director's duties. The representation that "GetSwift is comfortable that no further disclosure will be required and accordingly, is happy to now confirm that it is in compliance with listing rule 3.1" is also relevant to Mr Macdonald's subjective state of mind. However, as will be detailed below, when viewed in the light of the whole of the evidence, I do not think the evidence (such as there is) surrounding the PwC's engagement is of significance.

Mr Eagle

1940 To the extent the true picture in revealed in the documents, Mr Eagle appears a somewhat melancholy figure in the GetSwift saga. Often harried by Messrs Hunter and Macdonald and told he was not pulling his weight, he at times attempted to make those running the show think well of him. Telling the ASIC to "f**k off" and release the Bareburger announcement as price sensitive, is an example of conduct which, as a solicitor, was unprofessional and probably uncharacteristic, but is perhaps best seen as an apparent attempt to ingratiate himself: see [1859].

1941 Alas, ASIC argues its case against Mr Eagle in a similar manner to that which is brought against Messrs Hunter and Mr Macdonald. To my mind, this presents some difficulties. Not only was

Mr Eagle on the outer for the reasons I have already explained above (at [1915]–[1922]), but I am not satisfied he had the same amount of knowledge or involvement in using the ASX announcements to engender investor expectations and influence GetSwift's share price. A number of reasons support this conclusion.

1942 *First*, expanding upon what I have outlined above (at [1921]), when Mr Eagle was circulated drafts of the ASX announcements before their release, his involvement and input was largely superficial. For example, in respect of Fruit Box, the evidence indicates his first involvement was when he was circulated a draft of the Fruit Box Announcement the night before it was released to the ASX: see [165]–[166]. Even though he did provide comments (see [165]), there is no evidence he had ever seen the actual Fruit Box Agreement by this stage. Rather, this occurred on 20 March 2017 (see [188]). Accordingly, he was not cross-checking the accuracy of the announcement against the terms of the agreement. Instead, his comments identify technical and grammatical errors only (see [165]), consistent with his email dated 2 February 2017, in which Mr Eagle stated:

> Let's use this experience to get the right routines in place for our announcements. Night before is good (particularly as a heads-up for Scott's early morning on the west coast), and for Jamila and I to review what's going out. **Always helpful for a fresh pair of eyes to pick up any errors, takes some of the burden off of Joel and Bane**.[2592]

1943 This view is fortified by the fact that it was Mr Mison who explained to him why the figures were as they were: see [168]. In some instances, Mr Eagle's involvement in the execution of the actual agreements did escalate: see, e.g., Pizza Pan (at [404]–[408]), Yum (at [882]–[884], [887]–[892] and [894]) and Amazon (at [971]–[973], [975], and [979]–[980])). However, for the most part his involvement in the "approval" of ASX announcements remained superficial. He was often circulated drafts moments before they were released, and any comments he had were seldom accepted: see, e.g., [419], [428], [532] and [661]. Moreover, as I explained above (at [1918] and [1921]), where Mr Eagle was a party to email correspondence about the timing or scheduling of ASX announcements, Ms Gordon was also party, indicating that these emails should be read as communications between the directors of GetSwift generally, rather than

[2592] GSWASIC00027406 (emphasis added).

specifically directed to Mr Eagle. Indeed, it was often Mr Mison or Mr Banson who circulated the draft before it was released: see [361]–[362], [570]–[572], [619]–[620].

1944 *Secondly*, Mr Eagle's involvement with the ASX as to labelling announcements as price sensitive reveals that this was done in more of an administrative capacity than anything else; that is, Mr Eagle's involvement focussed on the *procedure* of marking the ASX announcements as price sensitive, rather than the actual *substance* of why they were being marked as price sensitive. Indeed, the evidence reveals that Mr Eagle was tasked by Messrs Hunter and Macdonald to liaise with the ASX regarding its processes of applying a price sensitive marker to ASX announcements. That issue is set out in a letter dated 19 September 2017 from Mr Eagle on behalf of GetSwift to Mr Black and Mr Kabega of the ASX, following the release of the Fantastic Furniture and Betta Homes Announcement on 23 August 2019 (see [622]–[627], [1854]–[1855]) and the First and Second NAW Announcements on 12 September 2017: see [778]–[792].[2593] Relevantly, the letter stated:

> Dear Andrew and Andrew,
>
> Once again I appreciate your time for us to meet in person last week. To confirm the error that was acknowledged by the Market Announcements team ("MAO"), this was in regard to NOT marking our announcement price sensitive, when MAO acknowledged that it should have been (per email from Andrew Kon 23 August 2017). The relevant announcement was released on 23 August 2017.
>
> We must also say that we continue to have concerns for the lack of **proper process** and visibility by which our requests for announcements to be marked price sensitive are ignored, and we as a company only find out once the announcement has actually been released. In addition, the comments you made at our meeting, and your recent emails, trying to clarify **what is required in order for an announcement to be confirmed as price sensitive appear to be quite inconsistent with how other companies have been treated.** See for example the following two announcements (attached to this letter), both marked by ASX as price sensitive:
>
> - Yojee Limited (ASX: YOJ), announcement of 14 September 2017 that concerned a non-binding letter of intent only, not even a completed, signed and enforceable agreement. This also involved a trading halt, pending a "software agreement" - note that a non-binding letter of intent is not a software agreement.
> - Dragontail Systems Limited (ASX: DTS), announcement of 11 September 2017 that concerned two new customer contracts and that only mentioned the number of stores in two specific locations that these new customers operated.

[2593] GSW.1019.0001.0136 attaching GSW.1019.0001.0137.

As you recall, our most recent announcement of 12 September 2017 was determined by MAO not to be price sensitive, and upon us providing an updated release, you insisted that it must include an actual dollar number to demonstrate the significance of the impact on our revenues; and that it was not sufficient simply to refer to "significant revenue increase" or similar wording. The two announcements identified above however contain no such requirement. Nor in fact do they contain anywhere near the amount of detail we included in our original announcement. Indeed, the Dragontail Systems Ltd announcement refers to the overall market size in the United States for the company – nothing to do with any specific contract. And as specified above, the announcement for Yojee Ltd merely refers to a non-binding letter of intent; which included a trading halt for a software agreement that in the end was only identified as a future contract yet to be executed. **This marked inconsistency in treatment is very concerning to us.** As we also discussed at our meeting these matters have a direct impact on our shareholders and potential shareholders, and the perception they have of the management team – lots of questions about why certain releases were not marked as price sensitive, and lots of comments about potential reasons for that, including that the management team forgot!

Further, you rightly pointed out that the ASX Guidelines as well as the Corporations Act require that the company, and only the company, is obligated to form the view as to whether the relevant information is market sensitive. You also rightly pointed out that the requirement is an 'objective' test, meaning it is the 'reasonable person' that is relevant. As I stated to you at our meeting – within 5 minutes of our most recent announcement being issued, blog sites were already making their own calculations as to potential dollar revenues and rightly concluding our announcement was a very significant one! This seems to us to be quite clearly the 'objective' person making such a determination , so it is again concerning that both us as a company as well as investors in our securities have a clear understanding of that announcement being price sensitive, but that the MAO vetoed that determination. By making yourselves the 'gatekeeper' on this matter, it is no longer true that it is the company, and only the company, that forms the view as to whether the relevant information is market sensitive. It appears we as a company must form the view, and then also hope that ASX personnel do not veto our determination. Clearly this is an inappropriate way for this matter to be managed.

Once again we are concerned with the lack of due process in how these determinations are made, the inconsistency we have identified in the dealings of other companies and most importantly the lack of opportunity on our part to learn of the MAO/ASX veto to any price sensitive flag prior to the announcement actually being released.

Given the above, we would like a commitment from the MAO/ASX to inform us first, and prior to any release, whenever there is a determination regarding the price sensitive nature of a release that differs from our own determination. We already discussed this commitment in person, and it is very much appreciated that you agreed to an informal process to facilitate this. However, given our very quick review of some other company announcements it appears to us that there has been unfair treatment. As such, we would like your confirmation that we now make this commitment formal, and not just informal.[2594]

[2594] GSW.1019.0001.0137.

1945 On 20 October 2017, Mr Black of the ASX sent this email to the MAO Group, copied to Mr Kabega, stating:

> As discussed with Irene, could you please put GSW on the watchlist with the following comment. ASX has had several conversations with GSW on the sensitivity analysis of their announcements in recent months, and this procedure will hopefully eliminate these issues.
>
> *If GSW believes an announcement they are about to lodge with ASX is market price sensitive, they will call MAO in advance to confirm this is the case, and ASX will release the announcement as price sensitive. For all other announcements, MAO will follow it [sic] standard procedures.*[2595]

1946 That same day, Mr Black sent an email to Mr Eagle stating:

> As discussed yesterday, ASX Market Announcements Office has placed GSW on the watchlist with the following comment.
>
> "If GSW believes an announcement they are about to lodge with ASX is market price sensitive, they will call MAO in advance to confirm this is the case, and ASX will release the announcement as price sensitive."
>
> For all other announcements, MAO will follow its standard procedures.
>
> Hopefully this will assist with the processing of your announcements in the future for sensitivity.[2596]

1947 At around this time, Mr Banson recalls Mr Eagle telling him that GetSwift had come to an arrangement with the ASX.[2597]

1948 Despite ASIC implementing an informal process for GetSwift's announcements, that process was not applied when GetSwift submitted the Johnny Rockets Announcement to the ASX for release on 25 October 2017. Mr Eagle's email dated 25 October 2017 to Mr Black, Mr Adrian Smythe and Mr Barnett (copied to Messrs Macdonald and Hunter) stated:

> Gents,
>
> Its seems the proposed resolution to our frustration has not resulted in a solution. Again today we are having problems sending out an announcement and having MAO personnel stating they are not aware of any process specific to us – but all we are told is that it is in the queue for assessment. This is hard work for matters that should be normal process! Particularly after our interactions regarding these matters,. [*sic*] Today, again, it has resulted in delays and delays in getting an announcement out.

[2595] GSW.1001.0001.0147 (italics in original).
[2596] GSW.1001.0001.0146.
[2597] Banson Affidavit (GSW.0009.0042.0001_R) at [28].

> We are being treated very, very differently to other companies – we have highlighted this to you with specific examples. And this is having a material impact in our shareholder/investor/potential investor relations that is readily documented, again as we have stated to you. It needs to be addressed further at this point.[2598]

1949 On 26 October 2017, Mr Black sent the following email to Mr Eagle:

> Hi Brett
>
> Have tried to call you yesterday afternoon and this morning to discuss the process with the release of GSW's announcement yesterday.
>
> Please give me a call to discuss when you can.[2599]

1950 Also on 26 October 2017, Mr Eagle sent the following email to Messrs Hunter and Macdonald

> Have been on the phone again this evening with ASX – Andrew Black reached out to me following our emails yesterday etc. It was very positive indicator for us – report from his internal team is that Peter (from CFO) did not state that the announcement should be price sensitive but rather said that he understood the arrangement was the ASX team would make a determination and let him know. Completely different to what Peter told me.
>
> In any event, Andrew Black's call was not about what he said/she said, but to let us know he has spoken again with the Market Announcements team to ensure they don't drop the ball, has explained again the arrangement for us etc. He then also said we are the only company with this arrangement and that in part it is a bit of an experiment for the ASX. Not bad! ☺
>
> At the least they are reinforcing internally these processes for us.[2600]

1951 On 30 October, Mr Hains sent an email to Mr Eagle, copied to Mr Banson which said "Eureka, you have changed ASX protocol! See 7 below on price sensitive announcements",[2601] and attached a compliance update letter from the ASX entitled "Listed@ASX, Compliance Update 30 October 2017, Updated no 09/7".[2602]

1952 To my mind, this chain of communications reveals little about Mr Eagle's state of mind in marking announcements as price sensitive, but does indicate that he was executing the job he was asked to do. Indeed, there is only one instance where Mr Eagle himself instructed Mr Banson to mark an announcement as price sensitive (the Bareburger Announcement); yet, even

[2598] GSW.1019.0001.0171.
[2599] GSW.1019.0001.0186.
[2600] GSWASIC00067273.
[2601] GSWASIC00005519.
[2602] GSWASIC00005519 at 5526.

then, this instruction was a direction from Mr Hunter and no case is brought against Mr Eagle in respect of Bareburger.[2603] In other circumstances, the evidence suggests he was simply copied into emails from Mr Hunter and Mr Macdonald instructing Mr Banson to mark the announcement as price sensitive, and made no independent evaluation as to whether an announcement should be marked as price sensitive.[2604]

1953 *Thirdly*, it is difficult to accept ASIC's contention that Mr Eagle was acutely aware of the importance of the ASX announcements in reinforcing, engendering and fostering investor expectations, at least to the same degree as Messrs Hunter and Macdonald, when Mr Eagle was not copied to a myriad of documents recording communications relating to the ASX announcement. Mr Eagle was not copied to each of the communications between Messrs Hunter and Macdonald regarding the scheduling and timing of releasing ASX announcements (see [1813], [1824], [1826], [1844]–[1848], [1850]) or the drafting of the substantive content of ASX announcements (see [149], [1844], and [1841] and its attachment [532]; [1843] and its attachment [568]; [1849] and its attachment [613]). Nor was he copied to communications with the media relations firm M+C Partners about the content, timing and scheduling of the Company's ASX announcements and the Company's exposure in the media (see [201], [615], [700], [1810], [1829], [1836]–[1837], [1870]–[1882], [1885]–[1892]) or with GetSwift's corporate advisers about the content of ASX announcements: see [1856]–[1857]. An extreme example of this is an email Mr Hunter sent to Mr Macdonald about Mr Hunter being a "workaholic", to which Mr Hunter wrote responded, "no rest till we are north to 1$b and I know you are taken care of for the future – I made you a promise – do or die on my part:" see [11]. No such do or die promise (whatever it may have been) appears to have been made by Mr Hunter to Mr Eagle, nor does it appear Mr Eagle even knew about it.

1954 *Fourthly*, while I accept that Mr Eagle was copied to a number of emails from Mr Hunter regarding the alleged effect of certain events on GetSwift's share price (see [1817], [1819], [1821], [1825], [1830]), unlike Mr Macdonald, there is no evidence of Mr Eagle responding to these emails; nor do they, to my mind, establish that Mr Eagle was operating on the same "wave length" as Messrs Hunter and Mr Macdonald.

[2603] GSWASIC00056588.
[2604] ECS at [57], and [59].

1955 In saying all this, Mr Eagle was not some form of detached spectator. As noted above, as the timeline progressed, his involvement in the negotiation of client agreements increased (see, e.g., Pizza Pan (see [404]–[408]), Yum (see [882]–[884], [887]–[892] and [894]) and Amazon (see [971]–[973], [975], and [979]–[980])). While his approval of ASX announcements might have overall been superficial, and Mr Eagle took on a passive role in comparison to Messrs Hunter and Macdonald, when the evidence is collated and viewed as a whole, in some instances, it points quite compellingly to an awareness on his part that the omitted information was information that he knew a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price.

1956 This is a convenient segue into one of Mr Eagle's contentions that I do reject. He submits that given he is only alleged to have been involved in nine of the 22 contraventions against GetSwift,[2605] which relate to only six Enterprise Clients (Fruit Box, Pizza Hut Australia, Betta Homes, NA Williams, Yum and Amazon) Mr Eagle could not have been an essential or integral participant in any "scheme" concerning ASX announcements and share price.[2606] It is said that for the six customers relevant to the case against Mr Eagle, only the contracts with Fruit Box and Betta Homes bear any similarity to one another, in that each had a roll out period independent of the initial term. The contract with Pizza Hut Australia was different, in that the roll out period was allegedly part of the initial term of the contract; the contract with NA Williams was a representative agreement in which NA Williams agreed to act, in effect, as GetSwift's sales representative in the North American Automotive Aftermarket. The NAW Agreement was not a contract in a form GetSwift typically entered into with its customers; and the contracts with Yum and Amazon were also not contracts that GetSwift typically entered into with its customers, but were MSAs, based on templates used by those respective companies.

1957 To my mind this simply demonstrates an effort by ASIC (which it is fair to say was not always successfully realised) of narrowing issues. It is not as though Mr Eagle had no engagement with the other Enterprise Clients, but his involvement was far more limited and, *prima facie*, it is difficult to see how a contravention would be made out on the evidence before me in respect

[2605] I note that Mr Eagle says eight in his submissions, however, for consistency, I have broken the Yum announcement down into two contraventions.
[2606] ECS at [51].

of those Enterprise Clients. While I accept that the nature of the agreements differ across the range of contraventions, that is not to the point; the broad narrative in respect of each Enterprise Client, what ASIC asserts makes up the contravention, remains the same.

A pleading point

1958 Before moving on, I should deal with a pleading point. Both Mr Hunter and Macdonald make a complaint regarding ASIC's case, namely, the suggestion that there was a "strategy" pursued by them in making the ASX announcements.[2607] It is said that to the extent that evidence is relied on to establish that Messrs Hunter and Macdonald embarked upon a deliberate course of unlawful conduct which caused GetSwift to make ASX announcements to increase its share price, then that would be a serious allegation "tantamount to an allegation of fraud" and, obviously enough, would have needed to be pleaded with particularity, which it was not.[2608] It is said (albeit without evidence) that the directors have made deliberate forensic decisions, such as not to give evidence, on the basis that no intentional case has been run and that to allow such a case to be run now would cause them prejudice.[2609] Candidly though, Mr Hunter acknowledges that "[t]o be fair the written closing submissions for ASIC do not appear to propound such a case."[2610]

1959 While on first brush this contention might thought to have a kernel of substance, it should be rejected. In oral closing, Mr Halley responded to these submissions as follows:

> Your Honour would have seen, in Mr Macdonald's submissions, it's suggested that there is some form of unpleaded deliberate course of unlawful conduct case. And in Mr Eagle's submissions, a suggestion of some joint enterprise. We say the case has not been advanced on that basis. Mr Hunter himself, in his submissions, acknowledges that that's not the case that … ASIC is advancing, not least because that, we would submit, would almost certainly be a criminal case.
>
> Our case isn't that they knew that it was material, they knew it was not generally available, and they deliberately went about coming up with a scheme to mislead the market by making announcements contrary to their obligations … **What we rely upon their views is … to say that they, by reason of their either dispatch or receipt of those emails, were firmly on notice of the relevance of the information contained in the ASX announcements to investors.**[2611]

[2607] HCS at [28]. See also MCS at [32].
[2608] HCS at [27]–[29]; MCS at [30]–[32].
[2609] HCS at [28].
[2610] HCS at [29].
[2611] T1085.7–21 (Day 17) (emphasis added).

1960 Three points should be made. *First*, contrary to Mr Hunter's submission, I do think a broad allegation as to a unlawful strategy of the type alleged is made. In the detailed particulars of knowledge, in respect of each alleged contravention by Mr Hunter and Mr Macdonald, the following is pleaded (taking Fruit Box as an example):

> [Mr] Macdonald knew, or ought to have known, that the information comprised information that a reasonable person would have expected, if it had been generally available, to have had a material effect on the price or value of [GetSwift's] shares, within the meaning of section 674(2) and section 677 of the [*Corporations Act*] by reason of the following matters:
>
> …
>
> **(GA) his recognition of the likely effect of announcements made by [GetSwift] to the ASX, concerning the entry by [GetSwift] into new agreements with clients, on maintaining and increasing [GetSwift's] share price and the likely negative impact on [GetSwift's] share price if [GetSwift] was not able to continue to make positive announcements concerning entry into new agreements with clients** …[2612]

1961 *Secondly*, what Mr Halley submits is plainly right: the evidence as to their communications goes into establishing their knowledge of what was omitted and its materiality to investors.

1962 *Thirdly*, I accept that Messrs Hunter and Macdonald are correct to contend that a case mounted in closing submissions that they embarked upon a deliberate course of unlawful conduct causing GetSwift to make announcements to increase its share price was not be open to run on the pleadings. But this is a different matter to whether evidence such as that summarised above at Part H.4.2 is relevant (within the meaning of ss 55 and 56 of the *EA*) to the logically distinct issues as to: (a) the likely effect of announcements made by GetSwift to the ASX concerning the entry into new agreements with clients on maintaining and increasing the share price; and (b) the likely negative impact if positive announcements concerning entry into new agreements could not be made. It is.

Principles applicable to inferential reasoning continued

1963 In this section I have, and will, make references to a number of inferences available from the evidence. The upshot of the case against the directors is that, unlike in respect of the case

[2612] Consolidated Knowledge Particulars (GSW.0002.0001.0947) at 0942 (emphasis added); see also 0759, 0766, 0777, 0785, 0791, 0797, 0802, 0808, 0814, 0820, 0826, 0830, 0834, 0839, 0847, 0851, 0858, 0862, 0866, 0871, 0876, 0885, 0895, 0901, 0903, 0908, 0910, 0916, 0923, 0929, 0936, 0942, 0951.

against GetSwift, in a number of circumstance, I am fortified in the inferences I have drawn by reason of the fact that none of the directors have given evidence. The authorities on this point are trite, but it is important that when one deploys any form of inferential reasoning, their principled application is borne closely in mind.

1964 All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted. This is reflective of the problem that in deciding issues of fact on the civil standard of proof, the Court is concerned not just with the question of probabilities on the limited material available, but also whether that limited material is an appropriate basis upon which to reach a reasonable decision: *Ho v Powell* [2001] NSWCA 168; (2001) 51 NSWLR 572 (at 576 [14] per Hodgson JA, with whom Beazley JA agreed). Considering the latter of these propositions, Hodgson JA stated (at 576 [15]) that "it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so".

1965 As I have explained above (at [125]), the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case and that the failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn: see *Hellicar* (at 412–413 [165]–[167] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Kuhl* (at 384–385 [63]–[64] Heydon, Crennan and Bell JJ).

1966 Elsewhere it has been remarked that "when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold": *Insurance Commissioner v Joyce* (1948) 77 CLR 39 (at 49 per Rich J); see also *Longmuir* (at 131 per Winneke P).

1967 But importantly, however, the rule cannot be employed to fill gaps in evidence, nor to convert conjecture and suspicion into inference: *Jones v Dunkel* (at 305–306 per Dixon CJ, at 309–310 per Menzies J and at 317 per Windeyer J); *Kuhl* (at 385 [64] Heydon, Crennan and Bell JJ). As Sir Owen Dixon stated in *Joyce* (at 61):

> It is proper that a court should regard the failure of [a party] to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorize the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition

instead of ratiocination.

1968 Indeed, before there can be greater confidence in an inference unfavourable to a party, the inference must already be available on the evidence.

1969 Of course, this supplements what I have already said above in respect of the burden and standard of proof and the use of *Jones v Dunkel* reasoning in a civil penalty proceeding: see [123]–[140].

Jones v Dunkel and the current proceeding

1970 As noted above, save for the tender of some miscellaneous documents, none of the directors adduced evidence to contradict the natural inferences ASIC urges me to draw from the contemporaneous documents, and none gave direct evidence. That tactical move in adversarial litigation was entirely open and understandable, but it is a move that does not come without consequences. I am willing to infer, speaking at a high level of generality, that the evidence of the directors would not have assisted their case, and, to adopt the words of the plurality in *Kuhl* (at 384–385 [63]), to draw with greater confidence, any inference unfavourable to the directors if they appear to be in a position to cast light on whether an inference should be drawn. Of course, the extent and influence of such an inference will be dependent upon the precise evidence adduced in relation to each of the directors and must be applied consistently with the principles I have articulated above.

1971 Before moving on, it is convenient to address a submission made by Mr Finch SC orally in respect of Mr Hunter, but which is representative of a core issue in the drawing of inferences in respect of each of accessorial liability claims:

> The problem for ASIC here is there is more than one available inference on the objectively verifiable historical record. The *first* would be that the parties didn't think about the listing rules at all in this connection, or about whether the omitted information needed to be notified. A *second* possible inference would be, well, they didn't think about the listing rules requirements, but they did think about the omitted information and thought it didn't need to be notified. A *third* one is that they did think about the listing rule requirements, but reached the same conclusion, that is, it didn't need to be notified for whatever reason. A *fourth* possible inference is they did think about the listing rules and they did think about the omitted information and did think it should be notified, but didn't do so.
>
> **Now, the problem for ASIC is there is simply no basis upon which you will draw that inference as opposed to any of the other inferences.** So that, although there is room on one view for *Jones v Dunkel* to operate, there is not room for your Honour to form a conclusion which helps your Honour form that degree of persuasion which

your Honour is required to about the state of Mr Hunter's knowledge.[2613]

1972 This submission was advanced with characteristic charm, but with respect, it is a slight mischaracterisation of how I am to apply *Jones v Dunkel*. To my mind, the fact that in theory there might be multiple inferences available is not to the point. In this case, the reality is that one inference was mostly far more compelling than any other. The relevant issue is whether the inference I am being asked to draw arises naturally or compellingly on the evidence and that such an inference is more readily available in the absence of the evidence to the contrary.

1973 Taking Mr Finch's *first* and *fourth* examples as an illustration and applying them at a level of generality to Mr Hunter:

(1) The *first* inference, that Mr Hunter did not think about the listing rules at all or about whether the omitted information needed to be notified, viewed objectively, is highly improbable. That is because Mr Hunter was aware of the Continuous Disclosure Policy, the statements in the Prospectus concerning when GetSwift would disclose material information, and indeed was continually drawing on the Listing Rules to justify the release of the ASX announcements: see [1903]–[1906].

(2) The *fourth* inference, that Mr Hunter did think about the listing rules and did think about the omitted information and did think it should be notified, but did not do so, is more compelling. That is because the contemporaneous evidence demonstrates overwhelmingly that Mr Hunter was acutely aware of the role of ASX announcements in engendering and reinforcing investor expectations, was intent on ensuring that the biggest "bang" was delivered to the market at the right time, and expressed he would not fail in reaching his share price targets no matter what it took.

1974 The proposition that *Jones v Dunkel* cannot fortify me in reaching the latter inference because the former is still remotely available must be rejected: see *Hellicar* (at 412–413 [165]–[167] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

1975 With these matters in mind, I finally turn to consider the contraventions alleged.

[2613] T1156.33–1157.2 (Day 16) (emphasis added).

H.4.4 *The contraventions alleged*

1976 Despite the tedious nature of this exercise, it is necessary to address each alleged contravention *seriatim*. While ASIC did provide lengthy particulars as to the knowledge of each director, their submissions on this point did very little to link facts to argument. This has made the process that follows both tedious and time consuming.

Mr Hunter

1977 The accessorial case against Mr Hunter relates to 19 of the 22 contraventions alleged against GetSwift: (a) Fruit Box Agreement Information; (b) Fruit Box Termination Information; (c) CBA Projection Information; (d) Pizza Pan Agreement Information; (e) APT No Financial Benefit Information; (f) CITO Agreement Information; (g) CITO No Financial Benefit Information; (h) Fantastic Furniture Agreement Information; (i) Betta Homes Agreement Information; (j) Betta Homes No Financial Benefit Information; (k) Bareburger Agreement Information; (l) NAW Agreement Execution Information; (m) NAW Projection Information; (n) Johnny Rockets Agreement Information; (o) Johnny Rockets Termination Information; (p) Yum MSA Information; (q) Yum Projection Information; (r) Amazon MSA Information; and (s) Second Placement Information (collectively, the **Hunter Omitted Information**).

1978 As noted above, Mr Hunter admitted that he contributed to the drafting of the: (a) Fruit Box Announcement (see [1274]); (b) CBA Announcement (see [1320]); (c) Pizza Hut Announcement (see [1368]); (d) APT Announcement (see [1406]); (e) CITO Announcement (see [1453]); (f) Fantastic Furniture & Betta Hones Announcement (see [1508]); (g) Bareburger Announcement (see [1574]); (h) First, Second and Third NAW Announcements (see [1596], [1599], [1659]); (i) Johnny Rockets Announcement (see [1664]); (j) Yum Announcement (see [1689]); and (k) First Amazon Announcement: see [1750].[2614] While not admitted, I have also found that Mr Hunter was also involved in approving the Second Placement Trading Halt Announcement: see [1777]. In respect of each of these announcements, I found that Mr Hunter knew that the announcement had been submitted to the ASX and had knowledge of its contents: see [1271]–[1272], [1319], [1368], [1406], [1453], [1508], [1574], [1595]–[1596], [1599]–[1600], [1659], [1664], [1689], [1750], and [1777] respectively.

[2614] Hunter Defence at [347(a)–(p)].

Hunter Agreement Information

1979 For the reasons I have already canvassed, I am satisfied that Mr Hunter had knowledge of the: (1) Fruit Box Agreement Information (see [1278]); (2) Pizza Pan Agreement Information (see [1379]); (3) CITO Agreement Information (see [1458]); (4) Fantastic Furniture Agreement Information (see [1510]); (5) Betta Homes Agreement Information (see [1548]); (6) Bareburger Agreement Information (see [1576]); (7) Johnny Rockets Agreement Information (see [1667]); (8) Yum MSA Information (see [1699]); and (9) Amazon MSA Information (see [1755]) (collectively, the **Hunter Agreement Information**).

1980 In relation to the "general availability" of each separately defined Hunter Agreement Information, Mr Hunter's contentions largely mirror those advanced by GetSwift. In respect of the Fruit Box Agreement Information, Mr Hunter submits that the statements contained in the Prospectus tend to suggest Mr Hunter would have regarded the existence of trial period as being information that was "generally available" (and therefore not price sensitive).[2615] This appears to mirror his contentions concerning the Pizza Pan Agreement Information, the Bareburger Agreement Information, and the Johnny Rockets Agreement Information.[2616] In respect of the other Hunter Agreement Information, no specific submissions have been advanced.

1981 Mr Hunter's contention as to the general availability of the Hunter Agreement Information should be rejected. As noted above (at [1910]–[1911]), Mr Hunter knew that the Hunter Agreement Information was contained in the corresponding client agreements, or otherwise had knowledge of this information. Mr Hunter was also the main man behind the impugned ASX announcements. Mr Hunter knew that the Hunter Agreement Information was not included in the corresponding ASX announcements. It follows that Mr Hunter had knowledge that each of the Hunter Agreement Information had not been disclosed to investors. Further, to the extent he relies on generic information in the Prospectus and Appendix 4C disclosures, or by a process of deduction from public sources, that position should not be accepted: see [1911]. To this end, I am satisfied that Mr Hunter knew that the Hunter Agreement Information was not generally available.

[2615] HCS [82]–[83].
[2616] HCS [125], [187]–[188], [232].

1982 The primary issue in dispute concerns whether Mr Hunter knew that the information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price.

1983 *First*, Mr Hunter claims that in respect of the ***Fruit Box Agreement Information***, ASIC has not established he knew that the Fruit Box Agreement was price sensitive, although he (understandably) does little to expand upon this point. In the light of the evidence which establishes Mr Hunter took considerable steps to manage the timing of the Fruit Box Announcement, and even commented how the Fruit Box Announcement would impact GetSwift's market capitalisation (see [1810]–[1818]), it is evident that he was acutely aware of its price sensitivity and materiality to investors. Further, given the general matters explained above (at [1901]–[1913]), along with the narrative that prior to the execution of the Fruit Box Agreement, Mr Hunter had instructed Mr Mison to prepare a draft ASX announcement concerning the entry into the agreement with Fruit Box (see [149]), subsequently amending the draft to include, *inter alia*, the Fruit Box Projection (see [161]), and finally approved the announcement which referred to a "3-year exclusive contract" but did not qualify the status of the Fruit Box Agreement (see [164]), the natural and compelling inference is that Mr Hunter knew that the Fruit Box Agreement Information (which contained information that had been omitted from the Fruit Box Announcement but that was relevant to the Fruit Box Agreement) would significantly qualify investor expectations as to the likelihood of GetSwift deriving any benefits under the Fruit Box Agreement.[2617] The drawing of this inference is fortified by my findings as to his intention to do everything in his power to boost GetSwift's share price strategically: see [1914]–[1922].

1984 *Secondly*, as to the ***Pizza Pan Agreement Information***, three contentions are raised by Mr Hunter. The *first* submission concerns factual circumstances (a) and (b). Mirroring GetSwift's argument above (see [1382]–[1389]), Mr Hunter submits that he would only have thought this information was price sensitive if he thought the announcement as a whole suggested that the agreement extended beyond Australia, which, given he included the reference to "in Australia" in the draft announcement, he did not. The *second* contention is that Mr Hunter did not have actual knowledge of factual circumstance (c). Mr Hunter submits that the Pizza Pan Agreement

[2617] ASIC Reply at [218].

being for a term of 12 months could only be price sensitive because of the positive assertion in the Pizza Hut Announcement that the agreement was a "multiyear" agreement, and given Mr Hunter received Mr Eagle's email requesting that the word "multiyear" be removed, which it was not (see [419], [1369]), "it was reasonable for Mr Hunter to proceed on the basis that "multiyear" would be removed from the announcement before it was released."[2618] The *third* submission concerns factual circumstances (d) and (e). Mr Hunter submits that the evidence supports the inference that he did not believe that the existence of the trial period was price sensitive information because it had already been disclosed in the Prospectus, and highlights that Mr Eagle did not believe that the existence of a trial period needed to be referenced, given he did not make any comments of this nature: see [419].[2619]

1985 As to his *first* submission, I found above that Mr Hunter had knowledge of the contents of the Pizza Hut Announcement: see [1368]–[1369]. I also found (at [1391]) that the reasonable hypothetical investor would have understood the text of the Pizza Hut Announcement as conveying that Pizza Pan was not only an Australian company but also an international one. This led me to conclude that factual circumstance (a) was not generally available: see [1391]. Nonetheless, I found that the Pizza Hut Announcement did not, on a proper reading, convey that the Pizza Pan Agreement extended to providing services outside Australia: see [1391]. As such, I was not satisfied that factual circumstance (b) was not generally available. Given Mr Hunter's knowledge of the Pizza Pan Agreement Information, his knowledge of the Pizza Hut Announcement (including the fact that he drafted it (see [416])), and the fact that there is not a single reference to "Pizza Pan" in the Pizza Hut Announcement, the natural inference is that he knew factual circumstance (a) was material. I am reassured in drawing this inference by Mr Hunter's evident strategy of attempting to ensure the maximum impact when making an ASX announcement: see [1914]–[1922]. As to the *second* submission, I have found that Mr Hunter had knowledge of the "slip": see [1369]. In these circumstances, because Mr Hunter knew the Pizza Hut Announcement stated that it was a "multiyear" agreement, when in actual fact, Mr Hunter knew that the Pizza Pan Agreement was for a term of 12 months only (which was admitted (see [1370]–[1371])), the natural inference is he knew this was material information. Indeed, as a matter of common sense, it is clear that both of these factors would significantly

[2618] HCS at [126].
[2619] HCS at [125].

qualify or limit the weight that investors could attribute to the announced Pizza Pan Agreement. Finally, Mr Hunter's *third* submission is not maintainable given his knowledge of what was contained in the Prospectus, alongside his involvement in drafting and approving the First Agreement After Trial Representation: see [2176]–[2181]. Moreover, his reliance on Mr Eagle's advice goes nowhere for the reasons I have outlined above: see [1915]–[1922].

1986 In any event, Mr Hunter had knowledge of the Pizza Pan Agreement Information (see [1379]) and had drafted the Pizza Hut Announcement (see [1368]). In the light of his knowledge of the general matters explained above (at [1901]–[1913]), what I found were his general intentions (see [1914]–[1922]), and his strategic timing of the "PH announcement" to coincide with the Annexure 4C (see [1839]), the compelling inference to be drawn is that Mr Hunter possessed the requisite state of mind as to the materiality and price sensitivity of the Pizza Pan Agreement Information (absent element (b) which I am not satisfied was not generally available).[2620]

1987 *Thirdly*, in respect of the ***CITO Agreement Information***, Mr Hunter argues that the evidence does not support a finding he knew or believed that this information was price sensitive. In regards to factual circumstance (b), Mr Hunter highlights that he was copied into several communications that indicated CITO was interested in using the GetSwift Platform: see [518] and [522].[2621] But as noted above, it does not follow that the mere expression of interest indicates that CITO proposed to commence using the GetSwift Platform to conduct deliveries: see [1457]. Mr Hunter was involved in the drafting and the editing of the CITO Agreement, and was well around the negotiations by reason of being sent a number of emails from Mr Macdonald as to exchanges with Mr Calleja and Mr Metaxiotis: see [507], [512], [518], [521]–[522], [524], and [528]. Indeed, he even drafted an email for Mr Macdonald to send to Mr Calleja regarding the proposed "Term Sheet", in which he described "an approach that will satisfy governance processes, whilst eliminating any perceived risk": see [521]. Ultimately, I found that Mr Hunter had knowledge of the CITO Agreement Information (see [1458]), and the evidence reveals he was the main draftsman of the CITO Announcement: see [532]–[533]. When viewed in the light of my findings as to his general intentions (at [1914]–[1922]) and his knowledge as to general matters (see [1901]–[1913]), the natural and compelling inference to

[2620] ASIC Reply at [263].
[2621] HCS at [154].

be drawn is that Mr Hunter knew the omission of the CITO Agreement Information would have significantly qualified the weight to be placed on the announced CITO Agreement and thereby influenced investor's in making a decision whether to acquire or dispose of GetSwift's shares.

1988 *Fourthly*, in respect of the ***Fantastic Furniture Agreement Information*** and ***Betta Homes Agreement Information***, Mr Hunter says that the evidence does not support a finding that he knew or believed that this information was price sensitive.[2622] This submission should be rejected. Mr Hunter had knowledge of the Fantastic Furniture Agreement Information (see [1510]) and Betta Homes Agreement Information (see [1548]). Indeed, he was copied to iterations of the draft of the agreements (see [601], [605], [645]–[664]), as well as emails clarifying the nature of the agreements, such as that from Mr Macdonald on 26 July 2017 in respect of the Fantastic Furniture Agreement, stating, "OK so the term sheet maps out a free trial for them and then makes it easy for them to roll straight into initial term upon successful trial. They do have the ability to opt out if they are not happy with the trial": see [610]. Moreover, not only was Mr Hunter behind drafting the Fantastic Furniture & Betta Homes Announcement (see [611]–[620]), the narrative reveals this announcement was part of broader strategic plan to announce contracts at an opportune time: see [611]–[615]. While the announcement was not ultimately marked as price sensitive, Mr Hunter believed it should have been and, after realising it was not, bellowed that it would be a "serious error" if the announcement was not "marked as material": see [622]–[627]. To my mind, the natural and compelling inference, when viewed in the light of my findings as to Mr Hunter's state of mind above (at [1914]–[1922]), and his knowledge as to general matters (see [1901]–[1913]), is that he knew the announcement did not contain important information arising from the agreements that would have significantly qualified the statements made and which would have been material to investors.

1989 *Fifthly*, as to the ***Bareburger Agreement Information***, Mr Hunter contends that the evidence does not support a finding that he knew or believed that this information was price sensitive.[2623] He repeats his submissions as to why it cannot be inferred that he thought the existence of a trial period was price sensitive information that needed to be disclosed to investors, but that

[2622] HCS at [172].
[2623] HCS at [188].

point has been addressed above (see [1980]–[1981]) and should be rejected. Mr Hunter had knowledge of the Bareburger Agreement Information (see [1576]), and was copied to the communications negotiating that agreement, and in fact told Mr Macdonald how to deal with the issue as to the signing of the wrong agreement: see [694]–[695]. He also was the mind behind the drafting of the Bareburger Announcement from its inception to its release: see [696]–[708]. Accordingly, Mr Hunter would have known that it contained the unqualified statements including the reference to an "exclusive commercial multi-year agreement". He also was not shy as to its impact and clearly viewed the announcement as price sensitive, circulating the draft announcement on 30 August 2017 stating "[t]his one goes out today with a price sensitive marker": see [706], [1858]. This was in the context of having been advised by Mr Kabega of the ASX a few days early on 25 August 2017 as to matters which would be taken into consideration by the ASX in determining whether an announcement would be marked as price sensitive, including information about material conditions of an agreement and the likely effect of the transaction on the entity's financial position (see [627]):

> Given my discussion yesterday with Brett regarding the announcement lodged by the Company on Wednesday morning, I just want to send through an email with some information that may be of help regarding the classification of announcements by ASX market Announcements Office (MAO). ASX provides quite a lot of information in its Guidance Notes regarding ASX's procedures and policy, so I hope you have had an opportunity to read some of the relevant Guidance Notes. Paragraph 10 of Guidance Note 14 – ASX Market Announcements Platform, outlines the process MAO follows when it receives an announcement, and states as follows.
>
> …
>
> As noted above, MAO makes the determination as to whether an announcement is market sensitive or not. The reason why MAO decided that the Company's announcement was deemed non-sensitive is that there was nothing disclosed in the announcement that indicated that the commercial agreements were material to the Company, that is, the announcement did not include any of the information as outlined above that ASX would expect to be included in an announcement released for the purposes of satisfying an entity's continuous disclosure obligations under Listing Rule 3.1. In addition, ASX reviewed the trading in the Company's securities following the announcement on Wednesday, and its share price increased 1.5% to close at 101.5 cents, on steady volumes, which is a further indication that the market did not perceive the announcement as sensitive from a Listing Rule 3.1 point of view.[2624]

1990 The natural inference, in the light of Mr Hunter's intention for maximum impact (see [1914]–[1922]), and his knowledge as to general matters (see [1901]–[1913]), is that he knew the

[2624] GSW.1001.0001.0148 at 0148–0149.

announcement did not contain important information arising from Bareburger Agreement Information that would have significantly qualified the statements made in the Bareburger Announcement and which would have influenced investors in determining whether to acquire or dispose of shares in GetSwift.

1991 *Seventhly,* concerning the ***Johnny Rockets Agreement Information***, similar contentions to those in respect of the Bareburger Agreement Information are advanced.[2625] My reasoning applies *mutatis mutandis*. I have found that Mr Hunter had knowledge of the Johnny Rockets Agreement Information (see [1666]), and indeed, was copied to the number of communications negotiating the Johnny Rockets Agreement: see [803]–[814]. As was the usual practice, Mr Hunter drafted the Johnny Rockets Announcement: see [816]–[824]. Given Mr Hunter was aware of both the Johnny Rockets Agreement Information and the Johnny Rockets Announcement, the inference to be drawn is that he knew the Johnny Rockets Announcement contained unqualified statements, such as a reference to an "exclusive commercial multi-year agreement". Further, Mr Hunter was copied to emails passing between Mr Macdonald and Mr Banson of The CFO Solution, including an email in which Mr Macdonald requested that the Johnny Rockets Announcement be "[m]arked as price sensitive" (see [822]) and an email sent by Mr Macdonald to Mr Polites of M+C Partners dated 24 October 2017, in which Mr Macdonald described the attached Johnny Rockets Announcement as "commercial in confidence": see [821]. This is all in the context of having been advised by Mr Kabega on 25 August 2017 as to matters which would be taken into consideration by the ASX in determining whether an announcement would be marked as price sensitive: see [627]. To my mind, when evidence is viewed as a whole in the light of Mr Hunter's state of mind (see [1914]–[1922]), and his knowledge as to general matters (see [1901]–[1913), the available and cogent inference is that Mr Hunter knew the Johnny Rockets Announcement did not contain important information arising from that agreement that would have significantly qualified the statements made and would have influenced investors in their decision to invest in GetSwift.

1992 *Eighthly*, as to the ***Yum MSA Information***, Mr Hunter advances a general argument that the evidence does not support a finding that he knew or believed that factual circumstances (a)–(d)

[2625] HCS at [187]–[188].

of the Yum MSA Information were price sensitive, although he does not expand upon this contention.[2626] I have found that Mr Hunter had knowledge of the Yum MSA Information and that the evidence reveals he was heavily involved in the negotiation of the Yum MSA: see [880]–[892], [1696], and [1699]. Mr Hunter also drafted the Yum MSA Announcement: see [896]. He also had firm oversight over the various drafts that followed: see [896]–[912]. Indeed, in iterations that followed, Mr Hunter made clear that the announcement "[n]eeds to have "significant commercial agreement": see [899]. In these circumstances, as I have found in respect of previous Enterprise Clients, I am satisfied that Mr Hunter knew the Yum Announcement contained unqualified statements such as a reference to a "global multiyear partnership". An inference can therefore readily be drawn, in the light of his knowledge of general matters (see [1901]–[1913]) and what I have found was his *modus operandi* (see [1914]–[1922]), that Mr Hunter knew the Yum MSA Information was material. This is particularly the case given information that the Yum MSA did not have a fixed term, that it could be terminated, that work was to be completed in accordance with SOWs, that the number of deliveries was not determinable, and that Yum was only contemplating conducting proof of concept trials in two test markets and that Yum was also testing other service providers which offered services similar to GetSwift, was all information that would have significantly qualified or limited the weight that investors could attribute to the announced Yum MSA. This conclusion is fortified by the fact that following the announcement, Mr Sinha expressed concern to Mr Hunter (among others) in relation to the content of the announcement and the way which GetSwift went about releasing it, and asked him why he had released an announcement containing so many inaccurate statements: see [915].

1993 *Ninthly,* as to the ***Amazon MSA Information***, Mr Hunter says that the evidence does not support the inference that he did knew or believed, during the eight hours following the release of the First Amazon Announcement, that the information was price sensitive.[2627] He says that this would, in substance, involve a finding that Mr Hunter believed that the First Amazon Announcement was materially incomplete at the time it was made.[2628] He says that the evidence

[2626] HCS at [251].
[2627] HCS at [269]–[270].
[2628] HCS at [270].

does not support such a finding given that: (a) Mr Hunter was copied on Mr Macdonald's email to Mr Eagle, containing the text of the announcement (see [995]); and (b) he saw the draft announcement go from Mr Eagle to Amazon (see [997]).[2629] Moreover, Mr Hunter submits that there was no communication from or to him suggesting that the proposed text of the announcement omitted material information; to the contrary, it is said that the text of the announcement suggested that the company (including Mr Hunter) believed that it was disclosing all that it was permitted to disclose ("no further information will be provided by the company *other than to comply with regulatory requirements for disclosure*").[2630]

1994 These submissions should not be accepted. Mr Hunter had knowledge of the Amazon MSA Information (see [1755]) and knew that the First Amazon Announcement would be price sensitive: see [996]. Indeed, he was responsible for the drafting of the First Amazon Announcement: see [994]. In these circumstances, I am satisfied Mr Hunter knew the First Amazon Announcement contained statements such as a reference to a "global agreement" that did not qualify the actual status of the Amazon MSA. I accept Mr Hunter seemed superficially concerned with GetSwift's continuous disclosure obligations, evidenced by the terms of the announcement and his email to Mr Eagle, Mr Macdonald, Mr Wilson and Mr Ozovek on 1 December 2017, stating "[d]ue to regulatoy [*sic*] requirements we may be required to put this out today": see [994], [1894]. But the genuineness of that concern is irreconcilable with the overwhelming weight of evidence up until this date evincing his motivation to do everything in his power to ensure GetSwift's share price was on an exponential trajectory: see [1914]–[1922]. Given these matters, relying on the general matters outlined above (at [1901]–[1913]), the compelling inference is that Mr Hunter knew the Amazon MSA Information would qualify the information conveyed in that Announcement by disclosing the material terms of the Amazon MSA. Indeed, by this stage, Mr Hunter had been put on notice time and time again of the meaning of material information and of the omission of key qualifying terms: see, e.g., [184]–[190], [1009]–[1010]. This further supports the inference that Mr Hunter was aware that information contained in the Amazon MSA would qualify the Amazon MSA Information, for example, by indicating that realisation of the benefits of the Amazon MSA by GetSwift was

[2629] HCS at [270].
[2630] HCS at [270]; First Amazon Announcement (GSW.1001.0001.0320) (emphasis added).

less certain given the MSA did not oblige Amazon to use GetSwift's services and also allowed Amazon to terminate the agreement for any, or no, reason by giving 30 days' notice.

1995 I am satisfied that Mr Hunter knew the Hunter Agreement Information was information that a reasonable person would expect, if it were generally available, to have had a material effect on the company's share price.

1996 Mr Hunter knew that investors expected that new contracts would only be announced following the completion of proof of concept or trial period: see [1901]. Similarly, in the period after the First Quantifiable Announcements Representation (i.e. all those bar Fruit Box and CBA), Mr Hunter knew that the expectations of investors were that new contracts would only be announced when the financial benefits were secure, quantifiable and measurable: see [1907]. As such, given the omitted Hunter Agreement Information would have informed investors that, at that time, the announced contracts were not secure, quantifiable, or measurable, and that the respective contracts remained subject to a trial (or the trial had not yet commenced), the compelling inference, particularly in the light of the evidence as to Mr Hunter's intentions (see [1914]–[1922]), is that Mr Hunter knew that the omission of such information was material in that it would have qualified or limited the weight that investors could attribute to the announcement to assess growth or project revenues, thereby influencing the decision of investors to acquire or dispose of GetSwift's shares.

1997 Ultimately, I conclude that Mr Hunter was aware of the Hunter Agreement Information, knew that it was not generally available and that it was material from the date on which it should have been disclosed. Apart from the Amazon MSA Information (in which case, ASIC's case is that the information was disclosed on 1 December 2017)[2631] and the Fruit Box Agreement Information (in which ASIC's case is that this information was disclosed on 25 January 2018), Mr Hunter took no steps to ensure the Hunter Agreement Information was disclosed prior to the commencement of this proceeding.

Hunter Projection Information

1998 Mr Hunter had knowledge of the following: (1) the CBA Projection Information (see [1355]); (2) the NAW Projection Information (see [1632]); and (3) the Yum Projection Information: see

[2631] ACS at [1630].

[1720] (collectively, the **Hunter Projection Information**). Moreover, with reference to the general discussions above (see [1910]–[1911]), I am satisfied Mr Hunter knew that each of the Hunter Projection Information was not generally available, and no specific contentions appear to be advanced to dispute such a finding.

1999 In relation to the materiality element, it is necessary to traverse through Mr Hunter's contentions.

2000 *First*, Mr Hunter contends that he did not believe the ***CBA Projection Information*** was price sensitive. He conceded that "[t]he CBA Projection Information could only be price sensitive to the extent that it materially affected the reliability of the projections contained in the CBA Announcement" but says, quite remarkably, that there is no evidence to suggest that he knew or believed that the projections in the CBA Announcement were unreliable.[2632] I need not repeat what I have said above on this point: see [1354]. The communications in evidence demonstrate clearly, and on numerous occasions, that Mr Hunter was informed that the projections in the CBA Announcement were unreliable. The evidence also indicates clearly that Mr Hunter knew CBA Projection Information was material, given it undermined the CBA Projections and their reliability (evidenced most directory by the rationale he himself provided for the calculation of those figures (see [245]–[248] and [290])), as it would have revealed the figures GetSwift utilised in the CBA Announcement were incorrect. Indeed, it seems Mr Hunter knew as much. On 8 March 2017, he sent an email to Mr Polites, stating with reference to an updated draft of the CBA Announcement in which he had reinserted the "55,000 retail merchants": "Ahead of the chat with CBA team, please find the revised release. It has minor *but VERY important additions/changes*": see [274][2633] This conclusion is fortified by my general observations above (at [1901]–[1913]) as to his knowledge of GetSwift's continuous disclosure obligations, and the fact that the evidence with respect to CBA, in particular, demonstrates Mr Hunter's main priority was the public image associated with the announcement, and more importantly, how it would impact GetSwift's share price. Indeed, in the drafting process he dictated to Mr Polites that "I need the number of merchants on the Albert platform stated" (see [267]), and when releasing the announcement, in a perhaps

[2632] HCS at [109].
[2633] GSWASIC00047193 attaching GSWASIC00047196, and GSWASIC00047178 (emphasis added).

unintendedly Tolkienesque manner, demanded it be released "preciously" and marked as "PRICE SENSITIVE": see [346].

2001 *Secondly*, Mr Hunter contends that the evidence does not support that he knew or believed that the ***NAW Projection Information*** was price sensitive because there can be no reason to conclude other than that he regarded the estimate to be reasonable. This issue has caused me some hesitation. I reached the conclusion that I am not satisfied Mr Hunter subjectively believed that the NAW Projections were inadequate, or that he ought to have known that they were on the facts known to him: see [1627]–[1629]. That was principally because he had sought, and thought he had been given, the approval of Mr McCollum. I did, however, find that Mr Hunter was aware of the remaining factual circumstances which comprise the NAW Projection Information. The question is whether Mr Hunter knew these circumstances would have been material to the reasonable investor? I accept that Mr Hunter engaged with the Second NAW Announcement by doing little more that appearing to throw in a figure to ensure the announcement was marked as price sensitive. He did, however, lower it from "$150 million" to "more than $138 million" to take into account "conversion rates etc", indicating at the least that he gave it some thought: see [783]–[792]. Further, looking at factual circumstances (e) and (k), on the evidence available to me, he may have subjectively believed that the wording of the NAW Announcements was sufficient to demonstrate that the NAW Agreement did not oblige any of the NAW clients to use the GetSwift Platform. That leaves the erroneous term and 90-day termination (factual circumstance (i) and (j)), the fact that none of NAW's clients at that date had trialled the Platform or entered an agreement with GetSwift (factual circumstances (m)–(o)), and that NA Williams had not given GetSwift any information about the price NAW Clients might be willing to pay, to found an awareness on Mr Macdonald's part that the First and Second NAW Announcements omitted material information. It is not without some significant hesitation that I conclude in the negative. While I accept Mr Hunter had an intense focus on share price, demonstrated here by noting the information about NA Williams was "highly sensitive and subject to ASX disclosure rules" (see [775]), I have not reached the level of satisfaction to conclude he knew that these factual circumstances, individually or collectively, were material.

2002 *Thirdly*, Mr Hunter contends that there is no evidence as to his knowledge of the materiality of the ***Yum Projection Information***. He says that a "businessman" does not approach questions

of materiality with a "lawyer's technical mind".[2634] Further, given he received Mr Sinha's 24 October 2017 email (see [870]–[879]), which indicated that Yum was making a "commercial commitment" to GetSwift and would endorse GetSwift as its preferred supplier, he contends it was likely that GetSwift would become the *de facto* exclusive supplier of last-mile delivery services. In the light of his response, by which he stated, "[t]hanks – great and that is acceptable" (see [879]), Mr Hunter says it cannot be concluded he thought the Yum Projection Information could constitute price sensitive information.[2635]

2003 These submissions cannot be accepted. From the outset, Mr Sinha expressly told Mr Hunter that the Yum MSA would simply "open the door technically for you across all brands" but was resolute that he could not guarantee exclusivity: see [876]–[878]. It is worth restating this email:

> **The exclusivity clause is really difficult for us to include simply because the nature of our organization and us not having total visibility around what other are in our business are doing or going to do over the next 3 years.** Our MSA that we will send you latest by tomorrow is agreed by all our brands globally and if Getswift signs it without any amendments than **that opens the door technically for you across all brands- PH, KFC and TB. This will save you the hassle of renegotiations and administrative delays. Once we have a successful "proof of concept"** we will endorse Getswift as our preferred vendor and I feel you have offered us an attractive price and combined with a great solution **you should be able to** achieve all your goals without having to spell it out. I would encourage you to agree with the preferred vendor status and have the options open to you.[2636]

2004 Indeed, Mr Sinha maintained that his email to Mr Hunter was not intended to, and did not, convey the possibility that GetSwift would become the supplier of delivery tracking and logistics software for all Yum brands globally: see [878]. Further, it is important to recall that the Yum Projection Information reflected basic known facts of which Mr Hunter was aware (see [1720]), including that a trial market had not been finally determined, that there would be no deliveries at all without successful completion of the trials and that Yum could not compel affiliates to enter into agreements or use the GetSwift Platform. While Mr Hunter may not have been a lawyer, he was a businessman – one who was finely attuned to GetSwift's share price: see [1808]–[1894]. In these circumstances, the compelling inference – indeed, the natural inference – is that Mr Hunter knew that such Yum Projection Information (absent factual

[2634] HCS at [253].
[2635] HCS at [253].
[2636] GSWASIC00037858 (emphasis added).

circumstance (a), which I am not satisfied existed (see [1720]) and (d) which I am not satisfied was not generally available (see [1740])) would substantially qualify statements that he had drafted to tell investors that there was an estimate of more than 250,000,000 annual deliveries and that Yum had partnered with GetSwift to "provide its retail stores the ability to compete with their global counterparts".

2005 Ultimately, I am satisfied that Mr Hunter knew that the Hunter Projection Information was material because it would have substantially qualified the delivery and revenue projections stated in the CBA and Yum Announcements. Aware of such information, the compelling inference is that Mr Hunter knew if such qualifications had been included, investors would have viewed the ASX announcements as being significantly less beneficial, thereby influencing their decision to acquire or dispose of GetSwift shares. This is common sense. Finally, while I do not place much weight on this factor, this conclusion is supported in the light of the proximity of the Yum Projection Information to the Second Placement, given that any qualifications to the projections would have had an influence on whether investors participated in the Second Placement. Indeed, Mr Hunter had informed the directors that the "timely planning and delivery of key commercial accounts is paramount", noting that there would be a spotlight on GetSwift with the "much larger and final" impending capital raise to be conducted in "Oct or thereabouts" (which is a reference to the Second Placement, albeit that it occurred in December): see [1817]–[1818]. As Mr Hunter said, "*no excuse* will stand in our way" to reach "$800M + market cap" (emphasis added): see [1817].

2006 For each of these reasons, I find Mr Hunter was aware of the Hunter Projection Information, knew that it was not generally available and knew it was material (apart from the NAW Projection Information) from the date on which it should have been disclosed, which was the time that each of the CBA, NAW and Yum Announcements was released by the ASX to the market. Mr Hunter took no steps to ensure the disclosure of the Hunter Projection Information prior to the commencement of this proceeding.

Hunter No Financial Benefit Information and Termination Information

2007 I am satisfied that Mr Hunter had knowledge of the following: (1) the Fruit Box Termination Information (see [1307]); (2) the APT No Financial Benefit Information (see [1441]); and (3) the Johnny Rockets Termination Information (see [1678]) (collectively, the **Hunter No Financial Benefit and Termination Information**). For reasons detailed above (see [1562]), I am not satisfied Mr Hunter had knowledge of the Betta Homes No Financial Benefit

Information (see [1562]) or the CITO No Financial Benefit Information (see [1480]–[1481]) and, as such, I will not address them further.

2008 For the reasons canvassed above, Mr Hunter knew that the Hunter No Financial Benefit and Termination Information was not generally available: see [1910]–[1911]. Any general contentions that this information was available through general information from the Prospectus, the Appendix 4C or any other process of deduction from public sources should be rejected: see [1911].

2009 There are a number of issues concerning the disputed materiality element.

2010 *First*, in respect of the ***Fruit Box Termination Information***, Mr Hunter's submissions proceed on the incorrect basis that the best evidence as to Mr Hunter's state of mind indicates that it was one of uncertainty in respect of whether Fruit Box had terminated the agreement.[2637] With reference to my findings (see [1307]) above, and in circumstances where Mr Hunter had prepared a draft announcement to the ASX disclosing the Fruit Box Termination Information (see [198]), the compelling inference, particularly when viewed in the light of my general observations above (see [1901]–[1913]) as to, for example, Mr Hunter's knowledge of the continuous disclosure policy, is that he was aware of the Fruit Box Termination Information and that this would be material. Indeed, the termination was the subject of express discussion as warranting disclosure: see [195]–[197]. This view is fortified by the fact that Mr Hunter had expressed views as to the materiality of the Fruit Box Agreement and the impact on GetSwift's market capitalisation following the Fruit Box Announcement being released: see [1810]–[1818].

2011 *Secondly*, Mr Hunter submits that the evidence does not support the conclusion that he did not know that the ***APT No Financial Benefit Information*** was price sensitive.[2638] In addition to the submissions dealt with above (at [1434]–[1441]), Mr Hunter points to the email he sent on 22 January 2018, which stated "APT is the only one that I am aware that terminated but the impact is immaterial": see [497].[2639] On one level, it might be said that this email is powerful evidence that Mr Hunter did not believe the APT No Financial Benefit Information was price

[2637] HCS at [84].
[2638] HCS at [135]–[138].
[2639] HCS at [138].

sensitive. However, the answer is not that simple. The issue with this contention, and with placing an over reliance on Mr Hunter's use of the term "material", is that it elides his view that the impact was immaterial in the context of an email that he was sending to Mr Macdonald and Mr Ozovek, advising which customers had paused or terminated, and the legal meaning of materiality. While I accept that it appears from this email that Mr Hunter may not have believed that the loss of APT was devastating news, I do not accept that it is determinative of his view at the time being that the information was immaterial (in the legal sense of the word).

2012 The fact is Mr Hunter was involved in the drafting of the APT Announcement and knew of its terms, including that it was announced as a "multi-year agreement": see [1406]. It is unrealistic for Mr Hunter to contend that the evidence supports that APT No Financial Benefit Information was not something he knew the market would consider price sensitive. Indeed, for someone who was committed to ensuring that the market thought there was new deals being signed weekly and that the benefits were being captured (see [1839]–[1841]), the compelling inference, particularly when viewed in the light of my observations above (see [1901]–[1913]), is that he knew the APT No Financial Benefit Information was material and would have directly influenced how investors would view the announced APT Agreement "win" and the chain of positive announcements he was concerned on ensuring were not impacted, as well as how the market perceived GetSwift's track record. This is a circumstance where I am fortified in my conclusion by the fact Mr Hunter could have given evidence to contradict this natural inference, and indeed, explain what he meant by his 22 January 2018 email, but he has not.

2013 *Thirdly*, as to the ***Johnny Rockets Termination Information***, I have already disposed of Mr Hunter's contentions that the Johnny Rockets Termination Agreement was not terminated at all, and his alternative submission that he was not aware of such termination: at [1675]–[1678]. Further, Mr Hunter contends that the evidence does not support a finding that he knew or believed this information to be price sensitive.[2640] This submission should be rejected. In circumstances where Mr Hunter knew that the Johnny Rockets Announcement had been released to the market as price sensitive (see [825]), had seen the announcement labelled as "commercial in confidence" in an email from Mr Macdonald to Mr Polites of M+C Partners (see [821]) and knew that the Johnny Rockets Termination Information qualified the

[2640] HCS at [236].

information in the respective announcement by revealing that the contract was no longer on foot and would not be a source of revenue for GetSwift, the natural and compelling inference is Mr Hunter knew that the Johnny Rockets Termination Information was material. This is particularly the case in the light of my observations above (see [1901]–[1913]) as to, for example, the continuous disclosure policy, Mr Hunter's focus on maintaining and increasing GetSwift's share price along, and his recognition of the likely negative impact not continuing to make positive announcements would have: see [1808]–[1894].

2014 Again, I should note, for completeness, that there is no need for me to address Mr Hunter's submissions as to the ***Betta Homes No Financial Benefit Information*** and the ***CITO No Financial Benefit Information***, as I am not satisified he was aware of such information.

2015 Ultimately, I am satisfied that for each of the Enterprise Clients forming part of the Hunter No Financial Benefit and Termination Information (absent Betta Homes and CITO), Mr Hunter knew that ASX announcements had been released to the market. He also knew, or his knowledge can be readily inferred, that the announcements had been marked as price sensitive. Although Mr Hunter was aware of the risks inherent with the GetSwift platform, including that some clients would never use the GetSwift Platform, the compelling inference is that Mr Hunter knew investors would operate on the basis that each of the previously announced contracts was still on foot and operated as a source of revenue.

2016 I am satisfied Mr Hunter was aware of the Hunter No Financial Benefit and Termination Information, knew that it was not generally available and that it was material from the date on which it should have been disclosed. Apart from the Fruit Box Termination Information (which was disclosed on 25 January 2018), Mr Hunter took no steps to ensure the disclosure of the Hunter No Financial Benefit and Termination Information prior to these proceedings commencing.

NAW Agreement Execution Information

2017 Mr Hunter had knowledge of the NAW Agreement Execution Information: see [1585]. Moreover, with reference to the general discussions above (see [1910]–[1911]), I find that Mr Hunter knew that the NAW Agreement Execution Information was not generally available until the First NAW Announcement was released to the market on 12 September 2017. Indeed, the combination of being involved in the drafting and negotiation of the agreement and announcement (see [1585]–[1587], [1596]), that Mr Hunter sent an email to Mr Polites of MC Partners attaching a draft of an ASX announcement concerning GetSwift's entry into an

agreement with NA Williams and stating there "no releases until after earnings season" (see [699], [1872]), that "one more big pateership [*sic*] just got signed … We can release when ready", and the email exchange between Messrs Hunter and Macdonald on 26 August 2017, in which they agreed that the announcement of the NAW Agreement Execution Information would be deferred until sometime after the following week (see [773], and [1850]), fortifies me in the conclusion the Mr Hunter must have known the NAW Agreement Execution Information was not generally available.

2018 The core dispute as to the NAW Agreement Execution Information concerns whether Mr Hunter knew the NAW Agreement Execution Information was material. Mr Hunter submits that, contrary to ASIC's pleadings, although the NAW Agreement was executed on 18 and 19 August 2017, the NAW Agreement did not come into effect until 1 September 2017.[2641] This is no answer. The obligation to disclose arises at the point in time that the disclosing entity becomes aware of the information, not from when an agreement comes into effect: see Listing Rule 3.1. Mr Hunter knew that GetSwift was aware of the NAW Agreement Execution Information on and from 18 August 2017: see [1585]. Other than this, Mr Hunter adopts GetSwift's submissions as to why there was no contravention of s 674(2) by not releasing the First NAW Announcement before 12 September 2017, but this goes nowhere, given I have already disposed of these submissions above: see [1590]–[1592].

2019 In any event, prior to its release, Mr Hunter engaged in an array of activities which indicate his knowledge as to the price sensitivity of the NAW Announcement. In addition to those matters addressed as to general availability above (see [2017]), Mr Hunter asked why the First NAW Announcement had not been released as price sensitive, stating: "Why is not price sensative? [*sic*] Brett? Zane?": see [779]. These factors, along with the observations above (at [1901]–[1913]), particularly with respect to Mr Hunter's focus on the timing of announcements, and strategy of delaying certain announcements to engender and reinforce investor expectations, fortifies me in finding that Mr Hunter knew the NAW Agreement Execution Information was material.

[2641] HCS at [216].

2020 For these reasons, I am satisfied Mr Hunter was aware of the NAW Agreement Execution Information, knew that it was not generally available and that it was material from the time that the NAW Agreement was executed until the First NAW Announcement was released to the market on 12 September 2017.

Conclusion

2021 I am satisfied that Mr Hunter was involved in GetSwift's contraventions of s 674(2) of the *Corporations Act* and therefore contravened s 674(2A) of the *Corporations Act* (apart from in respect of the Betta Homes No Financial Benefit Information and CITO No Financial Benefit Information). It follows that in respect of the ***Second Placement Information***, Mr Hunter was also involved in GetSwift's contraventions of s 674(2) of the *Corporations Act* and therefore contravened s 674(2A).

2022 I find that Mr Hunter was involved in 16 of GetSwift's 22 contraventions (as listed at [1977] alleged against GetSwift).

Mr Macdonald

2023 The accessorial case against Mr Macdonald relates to all 22 contraventions alleged against GetSwift (collectively, the **Macdonald Omitted Information**).

2024 As noted above, Mr Macdonald admitted that he directed and authorised the transmission to the ASX for publication of the following announcements: (a) Fruit Box Announcement (see [1275]); (b) Pizza Hut Announcement (see [1368]); (c) APT Announcement (see [1406]); (d) CITO Announcement (see [1453]); (e) Hungry Harvest Announcement (see [1492]); (f) First NAW Announcement (see [1596]); (g) Johnny Rockets Announcement (see [1664]); (h) Yum Announcement (see [1689]); and (i) First Amazon Announcement (see [1750]).[2642] While not admitted, I also found that Mr Macdonald was also involved in approving the content of, and authorising the release of the following ASX announcements for the purpose of publication: CBA Announcement (see [1320]), the Fantastic Furniture & Betta Homes Announcement (see [1508]), the Bareburger Announcement (see [1574]), the Second and Third NAW Announcements (see [1600]–[1601], and [1659]) and the Second Placement Trading

[2642] Macdonald Defence at [271(a)(i)–(ix)].

Halt Announcement (see [1777]). In respect of each of these announcements, I found that Mr Macdonald knew that the announcement had been submitted to the ASX and had knowledge of its contents: see [1275], [1368], [1406], [1453], [1492], [1595]–[1596], [1664], [1689], [1750], [1319], [1508], [1600], [1659], [1777] respectively.

Macdonald Agreement Information

2025 I am satisfied that Mr Macdonald had knowledge of the following information: (1) Fruit Box Agreement Information (see [1268]); (2) Pizza Pan Agreement Information (see [1379]); (3) APT Agreement Information (see [1408]); (4) CITO Agreement Information (see [1458]); (5) Hungry Harvest Agreement Information (see [1495]); (6) Fantastic Furniture Agreement Information (see [1510]); (7) Betta Homes Agreement Information (see [1548]); (8) Bareburger Agreement Information (see [1576]); (9) Johnny Rockets Agreement Information (see [1666]); (10) Yum MSA Information (see [1699]); and (11) Amazon MSA Information (see [1755]) (collectively, the **Macdonald Agreement Information**).

2026 Further, for the reasons expressed in my general discussion above (see [1910]–[1911]) and in the absence of Mr Macdonald specifically advancing submissions on this element, I am satisfied that Mr Macdonald knew that the Macdonald Agreement Information was not generally available. The primary dispute concerns whether Mr Macdonald knew that the information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on GetSwift's share price. It is necessary to navigate through Mr Macdonald's submissions on this issue in some detail.

2027 *First*, as to the ***Fruit Box Agreement Information***, while Mr Macdonald accepts he was aware that Fruit Box was in a trial period that could be terminated, at the time he directed Mr Banson to release the Fruit Box Announcement, he says that it has not been established that he knew that information to be material.[2643] Mr Macdonald's submission is developed on the basis that he initially directed Mr Mison to release the announcement without a direction of price sensitivity (see [164]) and that it was only after he was prompted by Mr Hunter (see [164]) that he directed Mr Mison to request that the Fruit Box Announcement be marked as price sensitive:

[2643] MCS at [167].

see [169]. Mr Macdonald contends that doing so does not demonstrate he knew the information in the Fruit Box Announcement to be material but that it is simply consistent with Mr Macdonald carrying out Mr Hunter's wishes.[2644]

2028 I disagree. Before any direction to Mr Banson or Mr Mison took place, Mr Macdonald was a party to communications with Mr Hunter as to the desired impact of the Fruit Box Announcement on GetSwift's share price: see [1813]. In this instance, it appears he also independently asked Mr Mison to draft the Announcement, which he said "represents more than 1.5 million deliveries that will be transacted on the getswift [*sic*] platform per year": see [149]. Further, even after he was told by Ms Mikac not to release the announcement before "a successful trial" (see [163]), he attempted to justify the announcement on the basis that, as a publicly listed company, GetSwift has a requirement to release "any material documents that are signed": see [173]. I am therefore satisfied Mr Macdonald was aware of the price sensitivity of the Fruit Box Agreement and its materiality to investors – it is not to the point that, in directing the announcement be marked as "price sensitive", he may have been acting in accordance with Mr Hunter's wishes.

2029 In any event, in the light of my general observations above (at [1901]–[1913]), and given Mr Macdonald knew Fruit Box was in a trial period that could be terminated at the time he directed Mr Banson to release the Fruit Box Announcement, which referred to a "3-year exclusive contract" but did not qualify the status of the Fruit Box Agreement, the natural inference is that he knew the Fruit Box Agreement Information would qualify investor expectations as represented in the Fruit Box Announcement as to the likelihood of GetSwift ultimately deriving any benefits under the agreement. Such an inference is all the more compelling in the light of the pellucid emails from Fruit Box following the release of the announcement; most pivotally, the email from Mr Halphen on 20 March 2017 stating "Joel. You still need to address your *misleading statement* and how you are going to rectify it. No contract for 3 years has been entered into as it is conditional on a trial. *That is a material omission*" (emphasis added): see [187].

[2644] MCS at [168].

2030 *Secondly*, in relation to the ***Pizza Pan Agreement Information***, Mr Macdonald contends that neither he, nor Mr Hunter, directed the Pizza Hut Announcement be released as "price sensitive" and that there is no evidence to suggest that he formed the view that the information in the Pizza Hut Announcement was material.[2645] This submission fails to acknowledge that Mr Macdonald was heavily involved in the drafting of the Pizza Pan Agreement, was aware of the aware of the Pizza Pan Agreement Information (see [1379]) and signed off on the contents of the Pizza Hut Announcement: see [1368]. It also fails to acknowledge the email Mr Macdonald received from Mr Hunter setting out the strategic timing of the Pizza Hut Announcement, and that this would be followed by "probably one every week or 10 days for the next 60 days", signalling the announcement formed part of a greater strategy to foster investor expectations: see [423], [1839]. Also relevant is that on the same day as the Pizza Hut Announcement, GetSwift made the First Quantifiable Announcement Representation, informing the market that "game changing partnerships … will be announced only when they are secure, quantifiable and measurable" and that GetSwift stands behind a "policy of quantifiable non hype driven announcements even if it results in negative short term perceptions": see [427]. The natural inference in the light of these factors, the matters I have outlined above (see [1901]–[1913]), and my findings generally as to Mr Macdonald's state of mind (see [1914]–[1939]) is that he knew the Pizza Pan Agreement Information was material, given that it would have substantially qualified the weight that investors would attribute to the Pizza Hut Announcement and thereby influenced investor's in determining whether to acquire or dispose of GetSwift's shares.[2646] It is important to carry across my finding that factual circumstance (b) cannot be regarded as price sensitive because it was generally available.

2031 *Thirdly*, concerning the ***APT Agreement Information***, Mr Macdonald contends that there is no evidence he engaged with the question of whether this information was material, including that he did not direct Mr Banson to ask the ASX to mark it price sensitive upon release.[2647] I disagree. This submission fails to acknowledge that Mr Macdonald, in addition to the matters outlined above (at [1901]–[1913]), was heavily involved in the drafting of the APT Agreement, had knowledge of the APT Agreement Information (see [1408]) and was the person who sent

[2645] MCS at [271]–[273].
[2646] ASIC Reply at [263].
[2647] MCS at [308]–[311].

the APT Announcement to Mr Mison to send to the ASX: see [457]. While I acknowledge it appears that Mr Hunter drafted the announcement (see [457]), it is unrealistic to suggest Mr Macdonald did not review it before sending it off. It naturally follows that he knew the APT Announcement made unqualified statements such as "exclusive commercial multi-year agreement". This is all in the context of him already having been berated for making a similar misleading announcement with respect to Fruit Box: see [172]–[174]. In all the circumstances, and taking into account my general findings as to Mr Macdonald's state of mind (see [1914]–[1939]), the most compelling inference available on all of the evidence is that he knew the APT Agreement Information was material.

2032 *Fourthly*, in respect of the ***CITO Agreement Information,*** Mr Macdonald submits that ASIC has failed to establish that he knew that information to be material at the time of the CITO Announcement and subsequently.[2648] He says that there is no evidence that Mr Macdonald engaged with the question of whether the information in the CITO Announcement was material, given he did not direct Mr Banson to ask the ASX to mark the announcement as price sensitive.[2649] I disagree. Mr Macdonald played a primary role in reviewing the CITO Agreement (see [532]), was heavily involved in the negotiations of the agreement with Mr Calleja and Mr Metaxiotis (see [502]–[503], [505]–[528]) and I have ultimately found he had knowledge of the CITO Agreement Information (see [1458]). Indeed, he knew that CITO would not be taking part in the cartage side of GetSwift's arrangement with Philip Morris International: see [513]–[515]. Further, he was also sent various iterations of the CITO Announcement by Mr Hunter (see [532]), and ultimately directed the announcement to be released to the ASX (see [532]). While I accept he did not instruct Mr Mison to ask the ASX to mark the announcement price sensitive, and that this may have relevance, I do not think it is in any way determinative. By this stage, the question of the means by which to designate price sensitivity was still up in the air (evidenced by his latter email in respect of the Fantastic Furniture and Betta Homes Announcement when he questioned whose role it was to mark announcements as price sensitive (see [624])). In any event, this announcement was in what was emerging to be the standard announcement template,[2650] which Mr Macdonald knew, on

[2648] MCS at [343]–[354].
[2649] MCS at [344].
[2650] GSWASIC00030318.

previous occasions, had been marked as price sensitive: see, e.g., [169]–[170]. When viewed in the light of my findings as to his general intentions above (at [1914]–[1939]), and his knowledge as to general matters (see [1901]–[1913]), the compelling inference is that Mr Hunter possessed the requisite state of mind as to the materiality and price sensitivity of the CITO Agreement Information and that the omission of the CITO Agreement Information would have significantly qualified the weight to be placed on the announced CITO Agreement.

2033 *Fifthly*, in respect of the ***Hungry Harvest Agreement Information***, Mr Macdonald submits that ASIC has failed to establish he knew that information to be material at the time of the Hungry Harvest Announcement and subsequently.[2651] As would be evident by now, the contraventions alleged in respect of Hungry Harvest are unique, in that they are only alleged against Mr Macdonald. While it might have been arguable that Mr Hunter was accessorily liable for the contraventions in respect of Hungry Harvest, that case is not pleaded. Mr Macdonald was the wheeler and dealer behind the Hungry Harvest Agreement: see [561]–[567]. Indeed, he specifically negotiated the terms with respect to the 30 day trial period: see [562]. The Hungry Harvest Announcement was drafted by both Mr Hunter and Mr Macdonald, at a time in which Mr Hunter emphasised to Mr Macdonald that "lets send out, we need to continue dialogue [with] market": see [568], [1843]. It naturally follows from all these matters that he knew the Hungry Harvest Announcement made unqualified statements such as "exclusive multi-year partnership". In the light of my general observations above (at [1901]–[1913]), as well as my findings as to Mr Macdonald's approach (at [1914]–[1939]), the compelling inference is that he knew that the Hungry Harvest Agreement Information would indicate that realisation of the benefits of the Hungry Harvest Agreement by GetSwift was less certain given that, among other things, GetSwift was still in a trial period.

2034 *Sixthly*, in respect of the ***Fantastic Furniture Agreement Information*** and the ***Betta Homes Agreement Information***, Mr Macdonald repeats his submission that ASIC has failed to establish he knew that information to be material at the time of the announcement and subsequently.[2652] I reject this submission. Mr Macdonald negotiated both the Fantastic Furniture and Betta Homes Agreements (see [599]–[607], and [644]–[664]) and had knowledge

[2651] MCS at [357]–[358].
[2652] MCS at [388], and [409].

of the Fantastic Furniture Agreement Information and the Betta Homes Agreement Information (see [1510], and [1548]). Indeed, he explicitly recognised in communication with Mr Clothier that "[Fantastic Furniture] have the ability to opt out if they are not happy with the trial": see [610]. Despite this, and what otherwise appears to be detailed negotiations over the terms of the agreements, when it came to the release of the announcement, to which Mr Macdonald made amendments (see [619]), he was content to allow the same nonsense of unqualified "exclusive commercial multi-year agreements" to be presented to the market: see [620]. I am also satisfied that he also knew that the realisation of benefits under the Betta Homes Agreement, for example, was far less certain than presented, given that he was aware that the two-month trial period had not commenced and would not commence until it was agreed that the GetSwift software platform was operating effectively: see [1548]. Moreover, any contention that Mr Macdonald did not think the agreements were price sensitive flies in the face of the subsequent communications where he and Mr Hunter were searching for someone to blame for the announcement not being tagged as such: see [622]–[627]. This fortifies the view expressed earlier that up until this time, the fact that Mr Macdonald had not requested announcements to be flagged as price sensitive is because he did not actually know whether that his role to do so – it does not mean he did not think the announcements were not price sensitive; all the evidence is to the contrary.

2035 When viewed in the light of my findings as to his intentions above (at [1914]–[1939]), and his knowledge as to general matters (see [1901]–[1913]), the compelling inference is that Mr Macdonald possessed the requisite state of mind as to the materiality and price sensitivity of the Fantastic Furniture Agreement Information and the Betta Homes Agreement Information and that the omission of such information would have significantly qualified the weight to be placed on the announced agreements. Indeed, the communications between Messrs Hunter and Macdonald surrounding the Fantastic Furniture and Betta Homes Announcement demonstrate that the timing was acutely calculated to have the greatest impact: see [1846]–[1850].

2036 *Eighthly*, as to the ***Bareburger Agreement Information***, Mr Macdonald repeats the same argument that there is no evidence he engaged with the question of whether the information in each of the accompanying announcements was material, save that here, he (along with Mr Eagle) directed Mr Mison to ask the ASX to mark the Bareburger Announcement as price

sensitive upon release: see [704], [706].[2653] He says, for the reasons I have canvassed above (at [1924]), that this fact should be given little weight.[2654]

2037 I disagree. Mr Macdonald was heavily involved in the drafting of the Bareburger Agreement (see [686]–[695]), had knowledge of the Bareburger Agreement Information (see [1576]) and was copied into various iterations of the Bareburger Announcement (see [1576]). Indeed, Mr Macdonald was expressly asked by Mr Hunter to "review and approve" the draft announcement: see [702]. This would have given him the opportunity to assess the accuracy of the announcement and see, yet again, that it included unqualified statements such as that GetSwift and Bareburger had signed an "exclusive multi-year agreement". But by this time the evidence reveals he was on board with the strategic release of announcements. Not only was he copied to emails from Mr Hunter which demonstrated a focus on using ASX announcements to influence investor expectations ("no releases until after earnings" (see [699], [1872])), but he actively engaged with such an approach. For example, specific to Bareburger, on 26 August 2017, Mr Hunter sent an email to Mr Macdonald which listed the ASX announcements, including "Bare burger" that GetSwift proposed to make in the future and their order, with which Mr Macdonald indicated he agreed: see [1850]. He was also the one who told Mr Banson to mark the announcement as "market sensitive" and for it to be released "15 mins [*sic*] before market open": see [706]. These facts are to be considered in the context of Mr Kabega of the ASX advising Mr Macdonald (and others) on 25 August 2017 as to matters which would be taken into consideration by the ASX in determining whether an announcement would be marked as price sensitive, including information about material conditions of an agreement and the likely effect of the transaction on the entity's financial position: see [627].

2038 To my mind, the natural and compelling inference, particularly in the light of my general observations above (at [1901]–[1913]), and my findings as to Mr Macdonald's intentions (at [1914]–[1939]), is that Mr Macdonald knew the announcement did not contain important information arising from that agreement that would have significantly qualified the statements made and which would have influenced investors in determining whether to acquire or dispose of shares in GetSwift. Indeed, I infer Mr Macdonald knew that the Bareburger Agreement

[2653] MCS at [434].
[2654] MCS at [434].

Information would indicate that realisation of the benefits of the Bareburger Agreement by GetSwift was less certain given that GetSwift was still in a trial period and thereby would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of GetSwift shares.

2039 *Ninthly*, as to the ***Johnny Rockets Agreement Information***, Mr Macdonald says that the statement in the Jonny Rockets Announcement that "a transaction yield in excess of millions of deliveries per year upon complete adoption and utilization" was sufficient for Mr Macdonald to have formed the view on 25 October 2017 that it was price sensitive information prior to the announcement being released.[2655] However, given it is said the Johnny Rockets Announcement did not, in fact, have a material effect on the share price of GetSwift, Mr Macdonald argues that it cannot be established that he, after the release of this announcement, continued to be aware that the information contained in the announcement or information qualifying the information in the announcement was material.[2656]

2040 I reject this submission. As Mr Macdonald accepts, he was clearly of the view the Johnny Rockets Announcement was price sensitive up until it was released. For example, when he emailed the announcement to Mr Polites an hour before it was released, he noted that it was being provided on the basis that it was "commercial in confidence": see [821]. He further noted in his email to Mr Banson attaching the announcement that it needed to be "[m]arked as price sensitive following normal procedure of calling MAO to confirm price sensitivity": see [822]. Indeed, he explicitly expressed the view that the announcement was price sensitive given they stated that "the delivery count will be in the millions": see [823], [1864]. The only evidence relied on to support the contention that this view changed is that the announcement had no material effect on the share market price. While I accept that Mr Macdonald would have been following the way in which GetSwift's share price responded to various ASX announcements, and that he may have viewed the materiality of information through this lens, this is insufficient to support the conclusion that he no longer viewed the information contained in the announcement or information qualifying the announcement as material.

[2655] MCS at [502].
[2656] MCS at [502]–[505].

2041 Rather, the natural, and more compelling, inference is that he knew the Johnny Rockets Agreement Information was material.[2657] This is so in the light of circumstances where Mr Macdonald was heavily involved in the drafting of the Johnny Rockets Agreement (see [803]–[815]), had knowledge of the Johnny Rockets Agreement Information (see [1666]), and was copied into various iterations of the Johnny Rockets Announcement (see [816]–[818]). Furthermore, this inference is supported when considering the knowledge of Mr Macdonald at a broad level, as outlined above (at [1901]–[1913]), and my findings as to Mr Macdonald's intentions: see [1914]–[1939]. Indeed, standing back and viewing the evidence as a whole, I believe Mr Macdonald would have known that the Johnny Rockets Agreement Information would have indicated that realisation of the benefits of the Johnny Rockets Agreement by GetSwift was less certain given that it included a limited rollout period, that rollout period had not yet commenced and the Agreement could be terminated at any time in the period up to seven days prior to expiry of the limited rollout period; all factors which, upon his review of the announcement, he did not think to include to qualify the statement that GetSwift and Johnny Rockets had entered into an "exclusive multi-year agreement".

2042 *Tenthly*, as to the ***Yum MSA Information***, Mr Macdonald's submissions are twofold. *First*, he contends that as to factual circumstances (a) and (b), the information was generally available from matters in the Prospectus, and that because there was disclosure of that information, there can be no basis to find the information was material.[2658] *Secondly*, as to factual circumstances (c)–(e), in addition to statements in the Prospectus, Mr Macdonald maintains that the evidence supports the conclusion that he had a "reasonable expectation" that Yum franchisees would proceed to agree on SOWs and use the GetSwift Platform and cannot be taken to be aware that these factual circumstances amounted to a material qualification to the information in the Yum Announcement.[2659] For convenience, I will address Mr Macdonald's specific contentions in respect of element (f) with the Yum Projection Information, which contains significant overlap: see [2054].

2043 The Yum MSA Information has caused me some pause. The *first* contention should be rejected for reasons I have explained: see [1911]. As to the *second* contention, I accept that there is

[2657] ASIC Reply at [263].
[2658] MCS at [537]–[539].
[2659] MCS at [540]–[542].

some merit in the evidence of Mr Sinha saying that "[GetSwift] should be able to achieve all [their] goals" (see [876]) forming a reasonable expectation in Mr Macdonald's mind that while no SOW had been issued, they were *expected* (that is, factual circumstance (d)). But this is neither here nor there – it is an intermediate fact that distracts from the substance of Yum MSA Information. Further, this provides no basis for a denial of the materiality of factual circumstances (c) and (e). In any event, it was heavily caveated. For example, in the same each in which email Mr Sinha sent (which was copied to Mr Macdonald), he stated (see [876]):

> The exclusivity clause is really difficult for us to include simply because the nature of our organization and us not having total visibility around what other are in our business are doing or going to do over the next 3 years.[2660]

2044 Mr Macdonald was heavily involved in the drafting of the Yum MSA, and indeed, the negotiations leading up to the MSA: see [880]–[893]. I have also found he had knowledge of the Yum MSA Information: see [1699]. Moreover, the evidence reveals that Mr Macdonald circulated and commented on various iterations of the Yum Announcement: see [896]–[912]. Indeed, he was the person who sent the announcement (along with the Amazon Announcement) to Mr Banson for release, noting "[t]hese will both obviously be price sensitive!": see [905], [996]. In these circumstances, I am satisfied Mr Macdonald knew the Yum Announcement included unqualified statements such as the reference to a "global multiyear partnership" and did not contain certain qualifications or limitations including that any revenue to be received by GetSwift was subject to GetSwift actually entering into specific SOWs with franchisees, it did not oblige Yum or any Yum Affiliate to use GetSwift's services or to make the deliveries using the GetSwift Platform and that the deliveries to be generated could not presently be determined.

2045 The compelling inference, in the light of the matters outlined above (at [1901]–[1913]), and my findings as to Mr Macdonald's focus on driving GetSwift's share price (see [1914]–[1939]), is that he knew the omission of the Yum MSA Information was important contextual and qualifying information relevant to an investor's assessment of the information disclosed in the Yum.[2661] This conclusion is fortified by the fact Mr Macdonald was copied to correspondence in which Mr Kapoor of Yum expressed dissatisfaction in the announcement: see [914]–[915].

[2660] GSWASIC00037858.
[2661] ASIC Reply at [389].

2046 *Finally*, as to the ***Amazon MSA Information***, Mr Macdonald submits that by reason of the limited terms of the First and Second Amazon Announcements, there can no basis to conclude these announcements would be interpreted by investors otherwise than in accordance with the disclosures in the Prospectus, and that accordingly, there can be no proper basis to find Mr Macdonald was aware the information was material.[2662] I reject these submissions, particularly in the light of my general observations above (see [1901]–[1913]) and the array of issues that had arisen to this point due to not disclosing key qualifying terms of agreements. In any event, Mr Macdonald was aware of the Amazon MSA Information and directed the First Amazon Announcement to be price sensitive: see [996] and [1755]. From these matters, the compelling inference is that Mr Macdonald had knowledge that the Amazon MSA Information would qualify the information conveyed in the First Amazon Announcement by disclosing matters as to the material terms of the Amazon MSA and the fact that a pilot had not been undertaken.[2663] Indeed, as I said in relation to Mr Hunter, by this time Mr Macdonald had been put on notice time and time again as to the omission of key qualifying terms (see, e.g., [184]–[190] and [1994]) similar to those contained in the Amazon MSA Information, which would, for example, indicate that realisation of the benefits of the Amazon MSA by GetSwift was less certain given the Amazon MSA did not oblige Amazon to use GetSwift's services and also allowed Amazon to terminate for any or no reason by giving three days' notice.

2047 Having dealt with each of Mr Macdonald's specific contentions with respect to each category of Agreement Information, it is appropriate to reinforce why I am satisfied that Mr Macdonald knew the Macdonald Agreement Information was information that a reasonable person would expect, if it were generally available, to have had a material effect on the company's share price. Mr Macdonald knew that investors expected that new contracts would only be announced following the completion of proof of concept or trial period: see [1901]. Similarly, in the period after the First Quantifiable Announcements Representation (i.e. all those bar Fruit Box and CBA), Mr Macdonald knew that the expectations of investors were that new contracts would only be announced when the financial benefits were secure, quantifiable and measurable: see [1907]. As such, given that the omitted Macdonald Agreement Information would have informed investors that the announced contracts were not, at that time, secure quantifiable or

[2662] MCS at [575]–[577].
[2663] ASIC Reply at [414].

measurable, or that the respective contracts remained subject to a trial (or the trial had not yet commenced), the compelling inference, particularly in the light of the evidence as to Mr Macdonald's intentions (see [1914]–[1939]), is that Mr Macdonald knew that the omission of such information was material in that it would have qualified or limited the weight that investors could attribute to the announcement to assess growth or project revenues, thereby influencing the decision of investors to acquire or dispose of GetSwift's shares. I reach these conclusions with greater confidence in circumstances where Mr Macdonald did not give any evidence to the contrary.

2048 Ultimately, I conclude that Mr Macdonald was aware of the Macdonald Agreement Information, knew that it was not generally available and that it was material from the date on which it should have been disclosed. Apart from the Amazon MSA Information (in which case, ASIC's case is that the information was disclosed on 1 December 2017) and the Fruit Box Agreement Information (in which ASIC's case is that this information was disclosed on 25 January 2018), Mr Macdonald took no steps to ensure the Hunter Agreement Information was disclosed prior to the commencement of this proceeding.

Macdonald Projection Information

2049 I am satisfied that Mr Macdonald had knowledge of the: (1) CBA Projection Information (see [1153]); (2) NAW Projection Information (see [1632]); and (3) Yum Projection Information: see [1723]) (collectively, the **Macdonald Projection Information**). Moreover, with reference to the general discussions above (see [1910]–[1911]), I am satisfied that Mr Macdonald knew that each of the Macdonald Projection Information was not generally available.

2050 In relation to the materiality element, it is necessary to deal with each of Mr Macdonald's contentions in turn.

2051 *First*, as to the ***CBA Projection Information*** (absent factual circumstance (b), which I am not satisfied existed (see [1331])), Mr Macdonald submits that, although he was aware GetSwift had assumed the CBA Projections over a five-year period despite the CBA Agreement being for two years (factual circumstance (a)), the evidence does not establish he was aware that the inclusion of the five-year projection in the CBA Announcement was material, given the generally available information as to the ability for GetSwift's clients to terminate contracts at will and the fact that, regardless of the term of an agreement, GetSwift was not entitled to

receive any revenue for any period after which the client ceased to use the platform.[2664] Further, Mr Macdonald relies on his submission that he was not aware of factual circumstances (b)–(f).[2665]

2052 These contentions miss the point and have been addressed at the awareness section above: see [1353]–[1354]. Although not as compellingly illustrated as in respect of Mr Hunter, on balance, I am satisfied to the requisite standard that Mr Macdonald was aware the CBA Projection Information was material. The fact that GetSwift had assumed the CBA Projections over a five year period despite the CBA Agreement being for two years, that CBA had informed GetSwift that the number of CBA retail merchants was not 55,000, and that the CBA Deliveries Projections and CBA Value Projections had not been provided by, or otherwise approved by, CBA were critical factors that undermined what was presented to the market by the CBA Announcement. Taking into account my general observations above (see [1901]–[1913]), as well as Mr Macdonald's intentions (see [1914]–[1939]), this is the conclusion to be drawn. My confidence in reaching this conclusion is confirmed in the absence of evidence from him. Finally, I should note that even if it is the case that Mr Macdonald did not know that factual circumstances (f)–(h) were material, as he contends,[2666] I am still satisfied that the remainder of the factual circumstances are on their own sufficient to establish his accessorial liability.

2053 *Secondly*, Mr Macdonald submits that his awareness of the materiality of the ***NAW Projection Information*** depends on his understanding of the reliability or otherwise of the information that is qualified, being the projections in the Second NAW Announcement.[2667] He says that it has not been established he knew that the alleged NAW Projection Information was a sufficient qualification on the reliability of the projections in the First NAW Announcement that its disclosure would have a material effect on GetSwift's shares.[2668] I accept this submission. While the evidence reveals Mr Macdonald had significant involvement in the negotiation and drafting of the NAW Agreement, his role in the announcement was far more limited. Indeed, he only made a minor typographical amendment to the phrase "Traction Heavy Duty": see [775]. Further, to the extent I have found Mr Macdonald was aware of the other factual

[2664] MCS at [225].
[2665] MCS at [238].
[2666] MCS at [238].
[2667] MCS at [474].
[2668] MCS at [479].

circumstances comprising the NAW Projection information, I have not reached the level of satisfaction to conclude he knew these were material. While I accept that he had a general focus, alongside Mr Hunter, of ensuring good news was delivered at calculated points in time (see [1914]–[1939]), and had knowledge of the general matters I have outlined above (see at [1901]–[1913]), it may have been the case that he read the announcement and thought that it adequately conveyed the position with respect to NA Williams's business model. The fact is that, on the evidence before me, it is not clear. I am not prepared to speculate and I am not satisfied that Mr Macdonald knew the NAW Projection Information was material.

2054 *Thirdly*, Mr Macdonald says that ASIC has failed to establish that the ***Yum Projection Information*** (as well as factual circumstance (f) of the Yum MSA Information) was a sufficient qualification to the information in the Yum Announcement.[2669] Three submissions are advanced. *First*, as to factual circumstance (a), Mr Macdonald submits that it cannot be established he was aware that the identity of the two trial markets, or the fact that SOWs had not been finalised, were material, given the intention of Yum was to proceed with two trials subject to documentation being agreed.[2670] *Secondly*, in respect of factual circumstance (f) of the Yum MSA Information and factual circumstance (d) of the Yum Projection Information, Mr Macdonald says that because there is no proof of his involvement in, or understanding of the reliability of, the calculation of the estimated number of deliveries per annum, it has not been established that he knew this information was material.[2671] *Thirdly*, as to the balance of the Yum Projection Information (factual circumstance (b), (c), (e) and (f)), Mr Macdonald says that ASIC has not established he was aware that these matters sufficiently qualified the information in the Yum Announcements and relies on the reasons that I set out concerning the Yum MSA Information, including that Mr Macdonald believed that Yum intended to roll out the GetSwift platform to its franchisees pursuant to agreed SOWs and Mr Sinha saying that "[GetSwift] should be able to achieve all [their] goals": see [876], and [2042].[2672]

2055 As to the *first* submission, Mr Macdonald had knowledge of the contents of the Yum Announcement and that it had been marked as price sensitive: see [1689]. As such, he knew

[2669] MCS at [544].
[2670] MCS at [545].
[2671] MCS at [546].
[2672] MCS at [547].

that statements such as "initial deployments *will* commence in the Middle East, and Asia Pac, with more than 20 countries slated to be rolled out in the first and second phase, followed by a broader deployment thereafter" had been made to the market. Notwithstanding that Mr Macdonald might have understood the intention of Yum was to proceed with two trials, he knew that any adoption of the GetSwift Platform by Yum beyond the contemplated proof of concept trials was actually conditional on the successful completion of the proof of concept trials; there was no certainty: see [842]. As to the *second* contention, given I did not find circumstance (d) was not generally available, his knowledge as to its materiality is otiose. The *third* contention is a repetition of a previous argument of GetSwift that I have already discussed, and dealt with: see [2043]–[2044]. In all the circumstances, and drawing on my general characterisation of Mr Macdonald's state of mind above (at [1914]–[1939]), the cogent inference is that Mr Hunter knew that such Yum Projection Information (absent factual circumstance (a) which presents unnecessary complication (see [1720]), and (d) which I am not satisfied was not generally available (see [1740])) would substantially qualify statements that had been drafted to tell investors that there was an estimate of more than 250,000,000 annual deliveries and that Yum had partnered with GetSwift to "provide its retail stores the ability to compete with their global counterparts…".

2056 For these reasons, I am satisfied Mr Macdonald was aware of the Macdonald Projection Information, knew that it was not generally available and that it was material from the time at which it should have been disclosed (absent the NAW Projection Information). Mr Macdonald took no steps to ensure the disclosure of the Macdonald Projection Information prior to the commencement of this proceeding.

Macdonald No Financial Benefit and Termination Information

2057 I have found that Mr Macdonald had knowledge of the: (1) Fruit Box Termination Information (see [1308]); (2) APT No Financial Benefit Information (see [1441]); (3) CITO No Financial Benefit Information (see [1482]); (4) Fantastic Furniture Termination Information (see [1529]); (5) Betta Homes No Financial Benefit Information (see [1560]–[1561]); and (6) Johnny Rockets Termination Information (see [1679]) (collectively, the **Macdonald No Financial Benefit and Termination Information**). Moreover, with reference to the general discussions above (see [1910]–[1911]), I am satisfied that Mr Macdonald knew that each of the Macdonald No Financial Benefit and Termination Information was not generally available. It is evident that Mr Macdonald knew that the omitted Macdonald No Financial Benefit and Termination

Information had not been disclosed in any of the ASX announcements by reason of his involvement in, and knowledge of, each of the announcements and client contracts.

2058 In relation to the materiality of the Macdonald No Financial Benefit and Termination Information, it is necessary to detail and address Mr Macdonald's submissions.

2059 *First,* Mr Macdonald contends that it has not been established he was aware that the ***Fruit Box Termination Information*** was material; a proposition he says is reinforced by his awareness that the Fruit Box Announcement did not, in the first place, have a material effect on GetSwift's share price. Moreover, he contends that the board's agreement that termination should be announced (see [195]–[196]) does not indicate his awareness on his part that the information was material, given that it was more likely the product of Mr Halphen's strongly worded complaints about the Fruit Box Announcement and his demands that GetSwift rectify it: see [184]–[189].[2673] With respect, this is nonsense. As noted (at [2028]) above, Mr Macdonald was copied into communications concerning the desired impact of the Fruit Box Announcement on GetSwift's share price: see [1813]. This suggests that, contrary to his submissions, he knew of the price sensitivity and materiality of the Fruit Box Agreement to investors. The natural and compelling inference is that Mr Macdonald also knew the termination of this price sensitive agreement was material, particularly in the light of my general observations (see [1901]–[1913]) including Mr Macdonald's knowledge of the Continuous Disclosure Policy, that investors would have operated on the basis that the Fruit Box Agreement remained on foot and would remain a source of revenue for GetSwift, and that disclosure of the termination would have influenced the way that an investor viewed the earlier contract "win". Indeed, the termination was the subject of express discussion as warranting disclosure: see [195]–[197].

2060 I should note for completeness that it is not to the point that Mr Hunter may have taken responsibility for "owning the retraction" (see [196]) and that he subsequently failed to do so. Every single announcement was circulated to Mr Macdonald before it went to the market. The compelling inference is that he knew, in the absence of any follow up from Mr Hunter, that this information had not been disclosed.

[2673] MCS at [171].

2061 *Secondly*, as to the ***APT No Financial Benefit Information***, Mr Macdonald makes three submissions as to why the evidence does not support a conclusion that he was aware that this information was material.[2674] *First*, Mr Macdonald submits that there is no evidence that he had engaged with the question of whether the information in the APT Announcement was material.[2675] *Secondly*, he submits that ASIC has not established that he knew that APT had ceased engaging with GetSwift at the time of the APT Announcement until, at the earliest, 22 January 2018, and even then it was Mr Macdonald's understanding that APT had "paused using" the platform.[2676] *Thirdly*, Mr Macdonald submits that the evidence does not establish that he was aware of the difficulties encountered by APT or the fact that APT had paused using the platforms were material.[2677]

2062 These submissions do not withstand scrutiny. As to the *first* contention, I have already dealt with Mr Macdonald's submissions as to his awareness of the APT Agreement Information (see [1408], the APT Announcement (see [1406]), and the APT No Financial Benefit Information: see [1436]–[1438]. On the basis of this knowledge, and in the light of my general findings as to Mr Macdonald's knowledge of GetSwift's continuous disclosure obligations (see [1901]–[1913]), as well as his state of mind (at [1914]–[1939]), I do not accept that the evidence supports an inference that Mr Macdonald was not aware that the APT Announcement was material. In any event, as to the *second* contention, the evidence reveals Mr Macdonald first learnt that APT had disengaged from GetSwift on 8 July 2017, after sending an email to Mr Clothier and Ms Noot to see how APT was "going with their account": see [482]. He was told their trial had ended, their credit had been removed, and that they had not logged a job in the last 30 days (since 7 June 2017): see [483]. On 9 July 2017, he stated: "They have not used GetSwift for a month which tells me they have dropped off because we dropped the ball and didn't make sure everything was OK. Guys this is not good at all" (emphasis added): see [485]. Moreover, by 17 July 2017, Mr Macdonald asked Mr Clothier in an email whether there was "any word back from [APT] and what they needed to get their trial underway?", to which Mr Clothier replied that he had called and emailed but that there was no response: see [491]. In the light of my general findings as to Mr Macdonald's knowledge of GetSwift's continuous

[2674] MCS at [308]–[311].
[2675] MCS at [309].
[2676] MCS at [310].
[2677] MS at [311].

disclosure obligations (see [1901]–[1913]), as well as his state of mind (at [1914]–[1939]), the compelling, if not overwhelming inference, is that he knew APT had ceased all communications with GetSwift, and that this was information which the market, whom he knew was being fed success after success, would view as material, given that it would influence how investor's viewed the previously announced the APT contract "win" and other announcements made by GetSwift.

2063 *Thirdly*, Mr Macdonald submits that the evidence does not support the conclusion that he was aware the ***CITO No Financial Benefit Information*** was material because the available evidence is consistent with an understanding on his part that Mr Calleja was "at the least open to using the GetSwift Platform in the future otherwise than in relation to its delivery work for PMI and had expressed positive views about it." Furthermore, Mr Macdonald submits that there is no evidence that he had engaged with the question of whether the information in the CITO Announcement was material.[2678] These submissions should be rejected. *First*, I do not accept that the fact that Mr Calleja was "at least open to using the GetSwift Platform" is conclusive as to Mr Macdonald's awareness of the materiality of the CITO No Financial Benefit Information. While Mr Macdonald might have thought Mr Calleja was open to using the GetSwift Platform in the future, or that he had expressed positive views about the platform, the fact is that by 1 July 2017, Mr Macdonald knew that CITO had not been requested or been provided with any of the services referred to in the CITO Agreement, had not sought access or been provided with access, had not made any deliveries using the GetSwift Platform and had not made payments: see [1482] and [2032]. Given that investors would have believed that the CITO Agreement remained a source of revenue for GetSwift (within a context in which investors would have also known that some clients may not use GetSwift's platform even after execution or could terminate the agreement), the overwhelming inference is that Mr Macdonald knew that the CITO No Financial Benefit Information would be material. Indeed, its disclosure would have altered how investors would assess the contract win in the CITO Announcement, thereby influencing their decision to acquire or dispose of GetSwift shares. Mr Macdonald could have been called to contradict this natural inference, but he was not.

[2678] MCS at [343]–[345].

2064 *Fourthly*, as to the ***Fantastic Furniture Termination Information***, there is little that has to be said. Mr Macdonald's submissions are founded upon the basis that he did not have knowledge of the Fantastic Furniture Termination Information and in any event, given he did not know the Fantastic Furniture Agreement Information was material, any termination of that agreement he could not have known any termination of that agreement would be material.[2679] Mr Macdonald's first contention cannot be sustained in the light of the plain email to him from Mr Nguyen on 22 September 2017 which noted: "Please accept this email as formal notice that we will not proceed after the trial period (1st of October)". Mr Hunter contends that it is plain from Mr Ozovek's correspondence which follows (see [634]–[636]) that Mr Nguyen's email did not indicate an intention on the part of Fantastic Furniture to cease using GetSwift's services, but instead simply to delay the process pending marketing approval.[2680] But that is beside the point. Fantastic Furniture was not proceeding with the Agreement that GetSwift had announced to the market as "exclusive" and "multi-year". Nor do I think the email of Mr Clothier of 20 October 2017 (see [637]) stating that "the project has been put on hold" assists Mr Macdonald. It simply demonstrates that GetSwift was going to try and "massage" the relationship in order to secure a partnership in the future. Indeed, the compelling inference is that Mr Macdonald read the email in its terms and, in the light of his knowledge of GetSwift's continuous disclosure obligations (see [1903]–[1906]), knew this information was material. Finally, I note for completeness that any contention that Mr Macdonald did not know the Fantastic Furniture Agreement Information was not material should also be rejected for the reasons I have outlined above: see [2034]–[2035].

2065 *Fifthly*, in respect of the ***Betta Homes No Financial Benefit Information***, Mr Macdonald says ASIC has failed to establish he knew the information to be material because the information available to GetSwift, until at least December 2017, suggested that the only obstacle for Betta Homes to begin utilising the GetSwift Platform was the finalisation of integration with Shippit and there is no compelling evidence upon which to find he knew that mere delay in the performance of the Betta Homes Agreement was material.[2681] In the business world there can often be more talk than action, and delays are often apparent. While I accept the force in ASIC's

[2679] MCS at [388].
[2680] MCS at [382].
[2681] MCS at [408]–[409].

submission that by 24 January 2018, which is notably five months after the signing of the Betta Homes Agreement, Mr Macdonald knew that integration with Shippit had not yet occurred, that Betta Homes had not agreed the platform was operating effectively, that Betta Homes had not completed its trial and that Betta Homes had not made any deliveries using the GetSwift Platform (see [1560]–[1561]), I have not reached the level of satisfaction to conclude that Mr Macdonald *knew* this information to be material. Of course, objectively, this information was material (see [1565]–[1568]); however, to be satisfied as to Mr Macdonald's subjective state of mind as to the materiality of this information requires something more. Unlike the position with respect to, for example, the Fruit Box Termination Information, the inevitability in Mr Macdonald's mind of the agreement falling through has not been made out.

2066 *Sixthly*, in respect of the ***Johnny Rockets Termination Information***, Mr Macdonald argues that the Johnny Rockets Announcement did not have a material effect on the share price of GetSwift and, therefore, the evidence does not establish he knew that the alleged Johnny Rockets Termination Information was material at the time he was forwarded Mr Roman's email on 9 January 2018 and onwards.[2682] This submission should be rejected. In circumstances where Mr Macdonald knew that the Johnny Rockets Announcement had been released to the market as price sensitive (see [825]), had labelled the announcement as "commercial in confidence" in an email to Mr Polites of M+C Partners (see [821]) and knew that the Johnny Rockets Termination Information qualified the information in the respective announcement by revealing that the contract was no longer on foot and would not be a source of revenue for GetSwift, the natural and compelling inference is Mr Macdonald knew that the Johnny Rockets Termination Information was material. This is particularly the case in the light of my observations above (see [1901]–[1913]) as to, for example, the continuous disclosure policy, Mr Macdonald's appreciation on maintaining and increasing GetSwift's share price and the likely negative impact of not continuing to make positive announcements: see [1808]–[1894].

2067 Therefore, I am satisfied that Mr Macdonald was aware of the Macdonald No Financial Benefit and Termination Information, knew that it was not generally available and that it was material (except the Betta Homes No Financial Benefit Information (see [2064])) from the time at which it should have been disclosed. Apart from the Fruit Box Termination Information (which was

[2682] MCS at [502]–[505].

disclosed on 25 January 2018), Mr Macdonald took no steps to ensure the disclosure of the Macdonald No Financial Benefit and Termination Information prior to the commencement of this proceeding.

NAW Agreement Execution Information

2068 Mr Macdonald had knowledge of the NAW Agreement Execution Information: see [1585]. Moreover, with reference to the general discussions above (see [1910]–[1911]), I find that Macdonald knew that the NAW Agreement Execution Information was not generally available until the First NAW Announcement was released to the market on 12 September 2017. Indeed, the combination of being involved in the drafting and negotiation of the agreement and announcement (see [1585]–[1587], [1596]), being copied into an email to Mr Polites of MC Partners attaching a draft of an ASX announcement concerning GetSwift's entry into an agreement with NA Williams and stated that there would be "no releases until after earnings season" (see [699], [1872]), and his email exchange with Mr Hunter on 26 August 2017, in which they agreed that the announcement of the NAW Agreement Execution Information would be deferred until sometime after the following week (see [773], [1850]), fortifies me in the conclusion that Mr Macdonald knew the NAW Agreement Execution Information was not generally available.

2069 The core dispute concerns whether Mr Macdonald knew the NAW Agreement Execution Information was material. While Mr Macdonald does not make any submissions directly to his awareness that the NAW Agreement Execution Information, the compelling inference is that he had knowledge of the NAW Agreement Execution Information on and from 18 August 2017: see [1587]. Further, prior to its release, Mr Macdonald engaged in an array of activities which indicate his knowledge as to the price sensitivity of the NAW Announcement: see [749], [772]–[776]). Also, on 26 August 2017, Mr Macdonald agreed to the timing of various announcements proposed by Mr Hunter, including the timing of the announcement of the First NAW Agreement, which appeared under the heading "We examine results, then after that we judge when we can": see [773]. In addition to those matters addressed when dealing with general availability (see [2068]), Mr Macdonald received an email from Mr Hunter which stated: "The most recent notice whose Release Date is : 12/09/17 09:05, and the heading 'GetSwift Partners with NA Williams for 1B Trans for 5yrs' should have been marked price sensitive": see [779]. These factors, along with the observations above (at [1914]–[1939]), particularly with respect to Mr Macdonald's aligned focus with Mr Hunter on the timing of

announcements, and delaying certain announcements to engender and reinforce investor expectations, fortify me in finding that Mr Macdonald knew the NAW Agreement Execution Information was material, in that it would influence a hypothetical reasonable investor's decision to acquire or dispose of shares in GetSwift.

2070 For these reasons, and in the absence of evidence from Mr Macdonald, I am satisfied Mr Macdonald was aware of the NAW Agreement Execution Information, knew that it was not generally available and that it was material from the time that the NAW Agreement was executed until the First NAW Announcement was released to the market on 12 September 2017.

Conclusion and the PwC Report

2071 Subject the qualifications I have indicated, Mr Macdonald was involved in GetSwift's contraventions of s 674(2) of the *Corporations Act* and therefore contravened s 674(2A) of the *Corporations Act*. It follows that in respect of the ***Second Placement Information***, Mr Macdonald was also involved in GetSwift's contraventions of s 674(2) of the *Corporations Act* and therefore contravened s 674(2A) of the *Corporations Act*.

2072 I find that Mr Macdonald was involved in 20 out of 22 of GetSwift's contraventions as listed at [2023].

2073 Before moving on, I should make a further comment about the engagement of PwC. Mr Macdonald submits that he was aware that PwC had conducted a review as to the extent to which GetSwift was compliant with Listing Rule 3.1 and sent on GetSwift's behalf a letter signed by Mr Macdonald confirming compliance with that Rule. He says he was aware that PwC was of the view that there was no material information that GetSwift was obliged to disclose from 19 February 2018 onwards.[2683] I have already discussed PwC's engagement at some length above and concluded that the 19 February 2018 Letter cannot be taken to demonstrate that PwC had expressed its view, and even if I was wrong and it did, in the absence of any evidence from either Mr Macdonald and/or someone from PwC (or relevant business records), I have no basis to conclude that view was formed on the basis of correct information: see [1933]–[1939]. I am not prepared, in the absence of evidence from Mr Macdonald, to accept

[2683] MCS at [106]–[107].

uncritically that the representation made in the 19 February 2018 Letter accurately reflected his subjective view based on reasonable grounds or, even less so, that it reflected the view of PwC.

2074 For completeness, I note that even if it was the case that the engagement of PwC is significant (which I do not accept on the evidence as it stands), that would only speak to the period after the retainer of PwC which, of course, was some time after the events with which I am concerned.

Mr Eagle

2075 The accessorial case against Mr Eagle relates to 9 of the 22 contraventions alleged against GetSwift: (a) Fruit Box Agreement Information; (b) Fruit Box Termination Information; (c) Pizza Pan Agreement Information; (d) Betta Homes Agreement Information; (e) NAW Agreement Execution Information; (f) NAW Projection Information; (g) Yum MSA Information; (h) Yum Projection Information; and (i) Amazon MSA Information (collectively, the **Eagle Omitted Information**).

2076 As noted above, Mr Eagle participated in the drafting, finalisation or authorisation (although to varying degrees) of the: (a) Fruit Box Agreement (see [1275]); (b) Pizza Hut Announcement (see [1368]); (c) Fantastic Furniture & Betta Homes Announcement (see [1543]–[1546]); (d) First and Second NAW Announcement (see [1595]–[1596] and [1599]–[1600]); (e) Yum Announcement (see [1689]); and (f) First and Second Amazon Announcement (see [1750] and [1753]). In respect of each of these announcements, I found that Mr Eagle knew that the announcement had been submitted to the ASX and had knowledge of its contents.

Eagle Agreement Information

2077 I am satisfied that Mr Eagle had knowledge of the: (1) Fruit Box Agreement Information (see [1279]); (2) Pizza Pan Agreement Information (see [1380]); (3) Betta Homes Agreement Information (see [1549]–[1550]); (4) Yum MSA Information (see [1698]–[1699]); and (5) Amazon MSA Information (see [1755]) (collectively, the **Eagle Agreement Information)**. Further, for the reasons canvassed above in my general discussion above (see [1910]–[1911]), I am satisfied that Mr Eagle knew that each of the Eagle Agreement Information was not generally available. There is no evidence that suggests that Mr Eagle thought that this information would be generally available, and, for reasons I have explained, any contention that Mr Eagle thought the Eagle Agreement Information was generally available through the

generic information contained in the Prospectus, Appendix 4C disclosures or by any process of deduction from public sources, should be rejected: see [1911].

2078 The primary dispute between the parties concerns whether Mr Eagle knew that the information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price. It is necessary to navigate Mr Eagle's submissions on this issue in some detail.

2079 *First*, ASIC alleges that Mr Eagle knew that ***Fruit Box Agreement Information*** was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price, from 27 March 2017. The reason why this date is chosen is that it is the date on which Mr Eagle was first sent a copy of the Fruit Box Agreement: see [188]. Indeed, prior to this, as I alluded to above (at [166]), Mr Eagle had limited involvement with Fruit Box. He first became involved when he was circulated a draft of the Fruit Box Announcement on 23 February 2017, the night before it was released to the ASX: see [165]. Mr Eagle submits that the Fruit Box Announcement was sent to himself and Ms Gordon in their positions as non-executive directors, as opposed to his capacity as a lawyer to "settle".[2684] Although Mr Eagle did provide comments, including one comment as to the calculation of the number of deliveries per year (see [165]), there is no evidence he had seen the Fruit Box Agreement by this stage. Accordingly, it cannot be said that Mr Eagle was cross-checking the accuracy of the announcement against the terms of the agreement. Instead, his comments identify superficial and grammatical errors only: see [165].

2080 The issue of Mr Eagle's knowledge in respect of the Fruit Box Agreement Information has caused me some pause. I accept, contrary to ASIC's submissions, there is no evidence that Mr Eagle knew that the Fruit Box Announcement had been marked price sensitive (he was not party to the instructions issued by Mr Hunter to Mr Mison (see [164]) or by Mr Macdonald to Mr Mison (see [169]) and there is no reference to marking the announcement price sensitive in the email exchange in which Mr Eagle provided his comments to Mr Mison (see [165]) or in the confirmation Mr Mison circulated to the directors of GetSwift by email (see [171])).[2685]

[2684] ECS at [160]. C.f. ACS at [1655(a)].
[2685] ACS at [1600], and [1665].

However, on 24 February 2017, Mr Eagle received Mr Hunter's email that the Fruit Box Announcement had added $3.8 million to GetSwift's market capitalisation: see [1817].

2081 Further, I am hesitant to infer that Mr Eagle simply receiving a copy of the Fruit Box Agreement on 20 March 2017 would have evidenced that the Fruit Box Agreement Information had been omitted and was material, given that there is no evidence that he had previously been involved with the Fruit Box Agreement in any way. However, the content of Mr Halphen's email, which was forwarded to him on the same day, could not have been clearer: "Joel. You still need to address your misleading statement and how you are going to rectify it. *No contract for 3 years has been entered into as it is conditional on a trial. That is a material omission*" (emphasis added): see [187]–[188]. Alarm bells would have started to ring in Mr Eagle's mind: it made plain that there was information omitted from the announcement, conveying, quite directly, the substance of what is asserted by the Fruit Box Agreement Information, and that this was thought by the client to be material. This is compounded by the fact that at the board meeting on 27 March 2017, the issue of the Fruit Box Announcement and Fruit Box's response appears to have been front and centre: see [195]–[197]. I am therefore satisfied, particularly in the light of my general observations as to Mr Eagle's knowledge of general matters, such as the Prospectus and the Continuous Disclosure Policy (see [1901]–[1913]), that Mr Eagle, from 20 March 2017 would have known that the Fruit Box Agreement omitted the Fruit Box Agreement Information, and that this was material. Indeed, the compelling inference is that he knew that realisation of the benefits of the Fruit Box Agreement by GetSwift was less certain given that GetSwift was still in a trial period, the three-year term was conditional on the expiry of the trial period, and that these were factors that would influence an investor in deciding whether to acquire or dispose of GetSwift's shares.

2082 A further issue arises in relation to the Fruit Box Agreement Information. Mr Eagle submits that, given he received Mr Hunter's email on 27 March 2017 which stated that a draft ASX announcement as to the termination of the Fruit Box Agreement was to be "put out forthright if its confirmed" (see [198]), the evidence suggests that Mr Eagle did not know that he needed to do anything further in relation to Fruit Box.[2686] This is to be rejected. As stated, this announcement did not proceed to be published to the market and no evidence provided an

[2686] ECS at [168]–[171].

explanation of why this did not occur: see [198]. What is clear to me is that Mr Eagle participated in the communications leading to the preparation of the draft announcement, including the board of directors meeting that took place on 27 March 2017. He was, therefore, acutely aware of the materiality of the information at that time and I am not satisfied that this view subsided simply because the issue was not raised further.

2083 *Secondly*, Mr Eagle's contentions in relation to the ***Pizza Pan Agreement Information*** proceed on the basis that the omitted information did not exist.[2687] That issue is of no moment given my reasoning above: see [1370]–[1378], [1380]. Alternatively, Mr Eagle states, in broad terms, that he did not have knowledge that the Pizza Pan Agreement Information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on GetSwift's share price.[2688] He relies on the fact his involvement was purely in relation to aspects of the drafting of the formal contract and there is no evidence he had any involvement in the commercial dealings underlying this contract. Equally, he points to the fact that he did not draft, nor was he asked to settle Pizza Hut Announcement.[2689]

2084 In all the circumstances, I have not reached the level of satisfaction to conclude Mr Eagle knew that the Pizza Pan Agreement Information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on GetSwift's share price. While Mr Eagle was involved in the drafting of the Pizza Pan Agreement, his role was minimal and compartmentalised. For example, Mr Eagle was asked by Mr Macdonald to consider certain comments and contractual issues as specifically identified: see [405]. In respect of the announcement, his involvement was also limited, and the comments he did provide suggested the removal of the term "multi-year": see [419]. In these circumstances, and in the light of my findings above that factual circumstances (b) was generally available (see [1391]), and (d) and (e) were not material (see [1400]), the only snag left for Mr Eagle is factual circumstance (a). I appreciate Mr Eagle was forwarded an email chain in relation which Mr Kuppusamy stated "I am with Pizza hut International that is part of Yum! Brands Inc" (see [436]), but given Mr Eagle's lack of any substantial involvement with the Pizza Pan

[2687] ECS at [220]–[225], and [232].
[2688] ECS at [232]–[233].
[2689] ECS at [234].

Agreement, I am not satisfied that this email is sufficient to infer that Mr Eagle was aware of the materiality of factual circumstance (a).

2085 *Thirdly*, in respect of the ***Betta Homes Agreement Information***, Mr Eagle advances three submissions: (1) the limited share price reaction and the fact that both the Fantastic Furniture Agreement and Betta Homes were cumulatively not considered material by the market;[2690] (2) the fact that he was not involved in the announcement prior to its release by the ASX;[2691] and (3) that there is no evidence that he had actual knowledge that the Betta Homes Agreement Information was material.[2692]

2086 These submissions, like a number of those in respect of Mr Eagle, have caused me some hesitation. To my mind, the point of significance is the second one. While the evidence reveals Mr Eagle had a significant involvement in the drafting of Betta Homes Agreement (see [655]–[660]) (although he was berated for not getting his comments in on time (see [658])), it does not appear that he had any involvement in the underlying commercial relationship. Further, his involvement in the Fantastic Furniture and Betta Homes Announcement is virtually non-existent: see [611]–[621], and [669]–[670]. Indeed, as Mr Eagle submitted quite forcefully, he was not even in the country when the announcement was being negotiated, and landed only two hours before it was released (see [661], and [1543]–[1546]), all of which was information the other director: see [666]. While I accept that when he returned there was uproar from Messrs Hunter and Macdonald about why the Fantastic Furniture and Betta Homes Announcement was not released as price sensitive (see [622]–[627]), and that Mr Eagle became heavily involved in talks with the ASX to ensure announcements were marked as price sensitive, I have not reached the level of satisfaction to conclude he knew that the omitted Betta Homes Agreement Information was material. Indeed, as I have outlined above ([1940]–[1957]), Mr Eagle's negotiations with the ASX were largely operational, raising an oversight by MAO: see [1944]–[1952]. While, of course, he ought to have checked the Fantastic Furniture and Betta Homes Announcement and, given his knowledge of general matters (at [1901]–[1913]), should have known that it omitted material information, this is not the test: *Big Star Energy* (at 107–108 [485]–[489] per Banks-Smith J). Further, while I accept that Mr Eagle could have been

[2690] ECS at [274]–[275].
[2691] ECS at [269]–[273].
[2692] ECS at [276]–[278].

called, to conclude on the material in evidence that he knew the Betta Homes Agreement Information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price, drawing an adverse inference would involve conjecture, given his more peripheral role.

2087 *Fourthly*, as to the ***Yum MSA Information***, Mr Eagle's primary contention is that it has not been established that he knew that this information was material and, as noted above (at [1698]), his state of knowledge was that the roll out of SOWs was imminent.[2693]

2088 This aspect of the case is not without difficulty. What the evidence reveals is that Mr Eagle was substantially involved with the drafting of the Yum MSA: see [882]–[884] and [887]–[892]. Indeed, he provided his comments in mark-up to Mr Macdonald, and was later told to prepare an executive summary of the changes he had made: see [883]. A few days later, he suggested further mark-ups (see [884]), received drafts back from Yum, and suggested further comments: see [888]. It seems he was quite invested in this task, asking permission from Messrs Hunter and Mr Macdonald to work directly with Yum's legal counsel. Mr Macdonald even gave Mr Eagle a compliment: "great work on the Yum MSA Brett": see [888]. Further negotiation ensued directly between Mr Eagle and Yum's legal counsel (see [889]–[892]), culminating in Mr Eagle emailing Ms Adams of Yum, "thanks so much … And now onto the roll out and SOWs": see [894]. The evidence further reveals that Mr Eagle was circulated the draft ASX announcement for Yum earlier than was usual (i.e., the morning on which it was to be sent): see [905]. He also engaged with this announcement more than usual, making substantial changes and suggestions, stating in an email on 30 November 2017 to Mr Hunter and Mr Macdonald (at [902]–[903]):

> I think in this particular announcement **being a little bit legalistic has a powerful impact** – see my language making clear up front that this agreement covers not just the ownership/affiliated chain of companies but **also the franchisees, licensees and joint ventures – in the US and internationally.** The language is lifted straight from our contract! [2694]

2089 Although none of his substantive changes were included (see [906]), this email reveals that not only was Mr Eagle well across the terms of the Yum MSA and what was being presented to

[2693] ECS at [385], and [389].
[2694] SWI00019038_UR (emphasis added).

the market by the Yum Announcement, but also the "powerful impact" that the Yum Announcement may have on the market.

2090 In these circumstances, in the light of my comments above (at [1901]–[1913]) as to Mr Eagle's knowledge generally as to the Continuous Disclosure Policy, an inference is available to be drawn, that he knew and appreciated that there was, for example, a material difference between an agreement where there was a deployment to be commenced (with additional roll outs to follow) and an agreement where no work would be performed or revenue would be generated until SOWs were agreed with individual affiliates (who could not be compelled to enter into them). What, to my mind, makes me hesitate in drawing this inference is the complaint to the ASX on 8 December 2017: see [925]. Indeed, Mr Eagle responds in the negative to a communication that specifically asked whether the Yum MSA is subject to "any other material conditions" not contained in the Yum Announcement: see [926]. While there must have been alarm bells ringing in Mr Eagle's head at this time, to conclude his state of mind was other than what he communicated contemporaneously to the ASX would involve making a serious finding. After all, Mr Eagle was a solicitor: he knew a communication of the type he was making was of importance and thought the issue was of such significance to copy external counsel: see [928]. In the end, on balance, and not without some disquiet, I have not reached a level of reasonable satisfaction necessary to make the finding of knowledge in this aspect of the case.

2091 *Fifthly*, concerning the ***Amazon MSA Information***, Mr Eagle contends that there is no evidence that he had actual knowledge that the Amazon MSA Information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on GetSwift's share price. I accept that Mr Eagle had a heavier than usual involvement in the drafting and negotiation of the Amazon MSA and communicated directly with personnel from Amazon: see [971]–[973], [975], [979]–[980]. I also accept that I have found Mr Eagle was aware of the Amazon MSA information by reason of his involvement: see [1755]. But when it comes to the content of the announcement, Mr Eagle's role is far more limited. When the draft announcement for a trading halt was circulated, Mr Hunter made comments and recirculated the announcement specifically stating "Ps pls hold until Joel reviews": see [899]. There was no mention of Mr Eagle, or that his comments would attach any significance. Furthermore, it appears that Mr Macdonald dictated what Mr Eagle was to do in relation to the announcement. He told Mr Eagle to email exactly what to send to Ms Fernandez (albeit, this email was ultimately sent to Ms Hardin): see [995], [997]. He did not instruct Mr Eagle to

review the announcement, nor did he invite Mr Eagle to draft the proposed announcement substantively or settle it. When he was again copied to emails relating to the announcement when it was released, he was not asked to comment on its contents: see [996]. In all the circumstances, I have not reached the level of satisfaction to conclude that Mr Eagle had actual knowledge that the Amazon MSA Information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on GetSwift's share price. Of course, as a director and solicitor, he should have known this announcement omitted critical information. The fact is, however, I am just not satisfied Mr Eagle comprehended the significance of what was omitted, or turned his mind to the need to qualify the information contained in the announcement.

2092 Concluding as to the Eagle Agreement Information, I am therefore only satisfied he was knowingly involved in GetSwift's s 674(2) contravention in respect of the Fruit Box.

Eagle Projection Information

2093 I am satisfied that Mr Eagle had knowledge of the following information: (1) Eagle NAW Projection Information (see [1637]–[1641], except for factual circumstance (i)); and (2) Eagle Yum Projection Information (see [1725]–[1729]) (collectively, the **Eagle Projection Information**). Turning to the generally available and materiality element of ASIC's s 674(2A) case against Mr Eagle, it is necessary to address each of Mr Eagle's contentions, although it is important to recall my general discussions above: see [1910]–[1911].

2094 *First*, as to the ***Eagle NAW Projection Information*** (which comprises factual circumstances (i)–(l) of the NAW Projection Information), Mr Eagle contends the following four points: (1) he did not have actual knowledge of the information at (i);[2695] (2) that the information at (j) was not material because there was nothing unusual or out of the ordinary about the termination provision in this contract that rendered it material;[2696] (3) that the factual circumstances (k) and (l) were disclosed in the NAW Announcements;[2697] and (4) relying upon his general contentions, Mr Eagle says that there is no evidence that he had actual knowledge that the Eagle

[2695] ECS at [327]–[330].
[2696] ECS at [325].
[2697] ECS at [322]–[324].

NAW Projection Information was information that a reasonable person would have expected, if it were generally available, to have had a material effect on GetSwift's share price.[2698] I have already made findings as to Mr Eagle's knowledge of element (i): see [1640]–[1641]. Further, Mr Eagle's contentions as to the general availability of elements (k)–(l) mirror GetSwift's reasoning, which I have already disposed of above: see [1646]–[1647]. However, with what remains, there is simply too little to conclude that Mr Eagle viewed the Eagle NAW Projection Information as material. It may have been the case that he read the announcement and thought that it adequately conveyed the position with respect to NA Williams's business model. To conclude either way would involve engaging in conjecture.

2095 *Secondly*, as to the ***Eagle Yum Projection Information***, given my findings above that Mr Eagle was not aware of elements (a) and (b), it is necessary only to consider elements (e) and (f).[2699] I am satisfied that these elements of the Eagle Yum Projection Information, which included information that Yum could not compel Yum Affiliates to use the GetSwift Platform or that no SOW had been issued under the Yum MSA, was information that would have substantially qualified the delivery and revenue projections stated in the Yum Announcement (the contents of which Mr Eagle had knowledge): see [1689]. But did Mr Eagle know this? I am not so sure. The evidence reveals that he believed SOWs were forthcoming: see [1698]. In all the circumstances, I am simply not satisfied that Me Eagle knew that the remaining factual circumstance – that Yum could not compel any Yum Affiliate to enter into any agreements including with GetSwift and use the GetSwift platform – would be material to investors. In any event, it would be extremely difficult to reach a conclusion that Mr Eagle knew the Eagle Yum Projection Information was material if he did not know the Yum MSA Information was.

2096 I am therefore not satisfied Mr Eagle should be accessorily liable for any of the Eagle Projection Information contraventions.

[2698] ECS at [331].
[2699] ECS at [383]–[384].

Fruit Box Termination Information

2097 I am satisfied that Mr Eagle had knowledge of the Fruit Box Termination Information: see [1309].[2700] With reference to the general discussions above (see [1910]–[1911]), I am also satisfied Mr Eagle knew the Fruit Box Termination Information was not generally available.

2098 More specifically, Mr Eagle contends the evidence does not support the conclusion that Mr Eagle knew the Fruit Box Termination Information was material, given he was not aware that the draft termination announcement had not been made.[2701] For the reasons stated above, I have found that Mr Eagle was aware that Fruit Box had terminated the agreement: see [1309]. However, does this mean that from then on Mr Eagle knew this information to be material? He submits that there is no evidence prior to January 2018 of any further event or information that occurred that should have put Mr Eagle on inquiry that he needed to do anything further in relation to Fruit Box, that he could have relied on Messrs Hunter and Macdonald to ascertain whether or not the agreement had been terminated, and if so, to release the ASX announcement that Mr Hunter circulated. Again, this is a gloss of the available evidence that is inconsistent with a common sense analysis. For example, Mr Hunter stated in his email attaching the draft termination announcement (to which Mr Eagle was copied) that "[e]ither way here is the proposed text and we should put *out forthright if its confirmed*" (emphasis added): see [198]. Given this email, and the enclosed draft ASX announcement, the compelling inference is that, in the light of his general knowledge (see [1901]–[1913]), he knew the Fruit Box Termination Information to be material and he did not take steps to disclose it.

2099 For these reasons, I am satisfied that Mr Eagle held the requisite knowledge as to the awareness of the Fruit Box Termination Information, that it was not generally available and that it was material from the time at which it should have been disclosed. Mr Eagle took no steps to ensure the disclosure of the Fruit Box Termination Information prior to 25 January 2018 when it became known via the disclosure to the ASX.

[2700] C.f. ECS at [183], and [187]–[190].
[2701] ECS at [187]–[190].

NAW Agreement Execution Information

2100 For the reasons that I have already provided (at [1586]–[1587]), I am satisfied that Mr Eagle had knowledge of the NAW Agreement Execution Information. Moreover, with reference to the general discussions above (see [1910]–[1911]), I am satisfied that Mr Eagle knew that the NAW Agreement Execution Information was not generally available until the First NAW Announcement was released to the market on 12 September 2017.

2101 Mr Eagle does not appear to contend that the NAW Agreement Execution Information was not material, and his only point of contention appears to be that the evidence suggests that he first became aware of the NAW Agreement on 5 September 2017 and that, on the evidence, disclosure on 12 September 2017 was "reasonably prompt in the circumstances".[2702] This contention is of no moment. *First*, for the reasons outlined above, I have found that Mr Eagle was aware of the NAW Agreement Execution Information on 18 August 2017: see [1586]. *Secondly*, and in any event, as a solicitor, who has not put in issue his knowledge of the relevant obligations of disclosure, it can readily be inferred that Mr Eagle was aware that GetSwift's obligation to disclose was as soon as it became aware of material information. There is no evidence to support the inference that the disclosure on 12 September 2017 was made "promptly". Indeed, the available evidence supports the contrary inference; that is, it appears that, when an ASX announcement was not marked as "price sensitive", Mr Eagle was capable of contacting the ASX to rectify the situation within hours, not days: see, e.g., [1946]. As such, I am satisfied Mr Eagle knew that this information was material.

Conclusion

2102 I conclude in line with my findings above that Mr Eagle was involved three of GetSwift's 22 contraventions of s 674(2) of the *Corporations Act* (as listed at [2075]) and therefore contravened s 674(2A) of the *Corporations Act*. I should note that I reach these conclusions with greater confidence in circumstances where Mr Eagle did not give any evidence to contradict the natural inferences available on the evidence. No case has been brought against Mr Eagle in respect of the ***Second Placement Information***.

[2702] ECS at [317]–[318].

I MISLEADING AND DECEPTIVE CONDUCT CLAIMS

2103 It is now necessary to turn to ASIC's misleading and deceptive conduct case. No doubt I am missing something, but why it was thought necessary and proportionate by ASIC that this case be persisted in, still remains unclear to me. But I must deal with it.

2104 In addressing this aspect of the case, I will adopt the following structure:

- **Part I.1** will summarise the law relevant to the misleading and deceptive conduct contraventions, focussing on the requirements in s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.
- **Part I.2** will outline a number of overarching findings in respect of the misleading and deceptive conduct case. Doing this will shortcut the analysis in respect of the contraventions alleged in respect of each Enterprise Client.
- **Part I.3** will then detail my findings in relation to the five general representations alleged to have been made by GetSwift. Only the latter two of these representations are said to be misleading or deceptive, while the others only form the foundation for the specific representations alleged to have been made.
- **Part I.4** will then detail my findings in relation to the no less than 41 specific representations alleged in respect of the Enterprise Clients. At the commencement of this section, I will again make some general findings to shortcut the analysis further, as well as deal generally with the position of Messrs Hunter and Macdonald.

2105 Like in respect of the continuous disclosure case, for those who prefer to shortcut the labyrinth, I have again included a ready-reckoner of my findings in respect of each of the alleged representations, pinpointed to the paragraph where the relevant finding is made.

General Representations						
Information		***Misleading or Deceptive Conduct?***		***The Defendants***		
Representation	Factual Circumstance	Does the representation arise?	Was the representation misleading or deceptive?	GetSwift	Hunter (personally)	Macdonald (personally)
First Agreement After Trial Representation **7 Dec 2016 until date of proceeding**	(a) a proof of concept, or trial phase, was completed before entry by GetSwift into an agreement with an Enterprise Client for the supply of GetSwift's services for reward; (b) further or alternatively, the agreements entered into by GetSwift with Enterprise Clients for the supply of GetSwift's services for reward were not conditional upon completion of a proof of concept or trial; (c) further or alternatively, an Enterprise Client was only asked to enter into an agreement with GetSwift for the supply of GetSwift's services for reward after the proof of concept or trial phase had been successfully completed	Y [2176] –[2181]	N/A			
First Quantifiable Announcements **28 April 2017 until date of proceeding**	An agreement would only be announced when the associated financial benefit to GetSwift was secure, quantifiable and measurable	Y [2182]–[2189]				

Second Agreement After Trial Representations **9 May 2017 until date of proceeding**	(a) a proof of concept, or trial phase, was completed before entry by GetSwift into an agreement with an Enterprise Client for the supply of GetSwift's services for reward; (b) further or alternatively, the agreements entered into by GetSwift with Enterprise Clients for the supply of GetSwift's services for reward were not conditional upon completion of a proof of concept or trial; (c) further or alternatively, an Enterprise Client was only asked to enter into an agreement with GetSwift for the supply of GetSwift's services for reward after the proof of concept or trial phase had been successfully completed	Y [2190]–[2195]				
Second Quantifiable Announcements Representation **31 Oct 2017 until date of proceeding**	GetSwift would only announce an agreement when the associated financial benefit to GetSwift was secure, quantifiable and measurable	Y [2196]–[2200]	Y [2201]–[2205]	Y [2205]	Y [2200], [2204], [2205]	Y [2200], [2205]
Third Quantifiable Announcements Representation **14 Nov 2017 until date of proceeding**	GetSwift would only announce an agreement when the associated financial benefit to GetSwift was secure, quantifiable and measurable	Y [2206]–[2209]	Y [2210]–[2212]	Y [2212]	Y [2209], [2212]	Y [2209], [2212]

Specific Representations

Information			***Misleading or eceptive Conduct***		***The Defendants***		
Enterprise Client and Information Alleged		Factual Circumstance	Does the representation arise?	Was the representation misleading or deceptive?	GetSwift	Hunter (personally)	Macdonald (personally)
Fruit Box	Fruit Box Agreement Representations **24 Feb 2017 to 25 Jan 2018**	(a) any trial period with Fruit Box had been successfully completed	Y [2228], [2230], [2234]	Y [2239]	Y [2244]	Y [2244]	Y [2244]
		(b) the Fruit Box Agreement was unconditional	Y [2228], [2231], [2234]	Y [2237]–[2239]			
		(c) Fruit Box had entered into an agreement with GetSwift which: (i) Fruit Box could not terminate for convenience; (ii) further or alternatively, required Fruit Box to use GetSwift exclusively for its last-mile delivery services for a period of three years	Y [2228], [2232], [2234]	Y [2237]–[2239]			
		(d) it had reasonable grounds for making the Fruit Box Projection	Y [2228], [2233], [2234]	Y [2239]			
	Fruit Box No Termination Representations **24 Feb 2017 to 25 Jan 2018**	(a) the Fruit Box Agreement had not been terminated	Y [2241]–[2243]	Y [2241]–[2243]	Y [2244]	N [2243]	N [2243]
		(b) GetSwift continued to have an agreement with Fruit Box which required Fruit Box to use GetSwift exclusively for its last-mile delivery services for a period of three years	Y [2241]–[2243]	Y [2241]–[2243]			
		(c) the following statements in the Fruit Box Announcement continued to be true: (i) GetSwift had signed a three-year exclusive contract with Fruit Box; (ii) Fruit Box currently manages over 1,500,000+ deliveries every year with significant growth projections in place; and (iii) the exclusive contract	Y [2241]–[2243]	Y [2241]–[2243]			

		with Fruit Box was projected at more than 7,000,000+ total aggregate deliveries					
CBA	CBA Agreement Representations **4 April 2017 to date of proceeding**	(a) an application suitable for rollout to CBA retail merchants had been developed	N [2250]–[2252]	N	Y [2269]	Y [2269]	Y [2269]
		(b) the CBA Agreement: (i) required CBA to use the GetSwift application developed (or to be developed) for CBA's Albert terminals to the exclusion of any competitive application for a period of five years, (ii) further or alternatively, was for a term of five years	Y [2253]–[2254]	Y [2264]			
		(c) GetSwift had reasonable grounds for making the CBA Projections	Y [2255]–[2258]	Y [2262]–[2263], [2264]			
	CBA Price Sensitivity Representation **4 April 2017 to date of proceeding**	(a) GetSwift had reasonable grounds to expect that the CBA Agreement was likely to have a material effect on either the price or value of GetSwift's shares	Y [2267]–[2268]	N [2267]–[2268]	N [2268]	N [2268]	N [2268]
		(b) alternatively, that the CBA Agreement was likely to have a material effect on either the price or value of GetSwift's shares	Y [2267]–[2268]	N [2267]–[2268]			
Pizza Pan	Pizza Pan Agreement Representations **28 April 2017 to date of proceeding**	(a) the Pizza Pan Agreement was made with a company which: (i) was one of the world's largest restaurant companies; (ii) was in control of the American pizza chain, Pizza Hut; (iii) had over 15,000 locations worldwide as at 2015	Y [2274]–[2276]	Y [2284]	Y [2287]	Y [2287]	Y [2287]
		(b) the Pizza Pan Agreement had, or was likely to have, worldwide application in the near future	N [2277]–[2278]	N			
		(c) the Pizza Pan Agreement was for a term of two or more years	Y [2279]	Y [2282]–[2284]			
		(d) any trial period or limited roll out with Pizza Pan had been successfully completed	Y [2280]	Y [2282]–[2284]			
	Pizza Pan Quantifiable	The financial benefit to GetSwift of the Pizza Pan Agreement was secure, quantifiable and measurable.	Y [2286]	Y [2286]	Y [2287]	Y [2287]	Y [2287]

	Benefit Representation **28 April 2017 to date of proceeding**						
APT	APT Agreement Representations **8 May 2017 to date of proceeding**	(a) any trial period with APT had been successfully completed	Y [2292], [2294], [2298]	Y [2302]	Y [2317]	N/A	Y [2317]
		(b) the APT Agreement was unconditional	Y [2292], [2295], [2298]	Y [2300]–[2302]			
		(c) the APT Agreement had commenced with a term of two or more years	Y [2292], [2296], [2298]	Y [2300]–[2302]			
		(d) APT had entered into an agreement with GetSwift which: (i) APT could not terminate for convenience; (ii) further or alternatively, obliged APT to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and (iii) further or alternatively, was for a term of two or more years	Y [2292], [2297], [2298]	Y [2302]			
	APT Quantifiable Benefit Representation **8 May 2017 to date of proceeding**	The financial benefit to GetSwift from the APT Agreement was secure, quantifiable and measurable	Y [2304]	Y [2304]	Y [2317]		Y [2317]
	APT Financial Benefit Representations	(a) APT had successfully trialled the GetSwift Platform	Y [2307]–[2308], [2311]	Y [2315]	Y [2317]	N [2316]	N [2316]
		(b) the APT Agreement was unconditional	Y [2307]–[2308], [2311]	Y [2313]–[2315]			

	17 July 2017 until date of proceeding	(c) the APT Agreement had commenced with a term of two or more years	Y [2307]–[2308], [2311]	Y [2313]–[2315]			
		(d) APT had made, and might continue to make, deliveries using the GetSwift Platform	Y [2307], [2309], [2311]	Y [2313]–[2315]			
		(e) APT was continuing to engage with GetSwift	Y [2307], [2309], [2311]	Y [2315]			
		(f) the statement in the APT Announcement, namely that GetSwift had "signed an exclusive commercial multi-year agreement with APT" continued to be true	Y [2311]	Y [2313]–[2315]			
		(g) by reason of the preceding six matters, it was likely that GetSwift would receive a financial benefit from the APT Agreement	Y [2307], [2310], [2311]	Y [2313]–[2315]			
CITO	CITO Agreement Representations **22 May 2017 until date of proceeding**	(a) any trial period or limited roll out with CITO had been successfully completed	Y [2320], [2322], [2325]	Y [2327]–[2329]	Y [2349]	Y [2349]	Y [2349]
		(b) the CITO Agreement had commenced with a term of two or more years	Y [2320], [2323], [2325]	Y [2327]–[2329]			
		(c) CITO had entered into an agreement with GetSwift which: (i) CITO could not terminate for convenience; (ii) further or alternatively, required CITO to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and (iii) further or alternatively, was for a term of two or more years	Y [2320], [2324]–[2325]	Y [2329]			
	CITO Quantifiable Benefit Representation **22 May 2017 until date of proceeding**	The financial benefit to GetSwift from the CITO Agreement was secure, quantifiable and measurable	Y [2331]	Y [2331]	Y [2349]	Y [2349]	Y [2349]

	CITO Financial Benefit Representations **1 July 2017 until date of proceeding**	(a) CITO had successfully trialled the GetSwift Platform	Y [2333], [2335], [2341]	Y [2343], [2344], [2348]	Y [2349]	N [2348]	N [2348]
		(b) the CITO Agreement had commenced with a term of two or more years	Y [2333], [2336], [2341]	Y [2343], [2344], [2348]			
		(c) CITO had made, and might continue to make, deliveries using the GetSwift Platform	Y [2333], [2337], [2341]	Y [2343], [2345], [2347], [2348]			
		(d) CITO was continuing to engage with GetSwift	Y [2333], [2338], [2341]	Y [2343], [2346], [2348]			
		(e) the statement in the CITO Announcement that GetSwift had signed an exclusive commercial multi-year agreement with CITO continued to be true	Y [2333], [2339], [2341]	Y [2348]			
		(f) by reason of the preceding five matters, it was likely that GetSwift would receive a financial benefit from the CITO Agreement	Y [2333], [2340], [2341]	Y [2347], [2348]			
Hungry Harvest	Hungry Harvest Agreement Representations **1 June 2017 until date of proceeding**	(a) any trial period with Hungry Harvest had been successfully completed	Y [2353]–[2354]	Y [2356]–[2357]	Y [2360]	N/A	Y [2360]
		(b) the Hungry Harvest Agreement was unconditional	Y [2353]–[2354]	Y [2356]–[2357]			
		(c) Hungry Harvest had entered into an agreement with GetSwift which: (i) Hungry Harvest could not terminate for convenience; (ii) further or alternatively, required Hungry Harvest to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and (iii) further or alternatively, was for a term of two or more years	Y [2353]–[2354]	Y [2356]–[2357]			
	Hungry Harvest Quantifiable Benefit Representation	The financial benefit to GetSwift from the Hungry Harvest Agreement was secure, quantifiable and measurable	Y [2359]	Y [2359]	Y [2360]		Y [2360]

	1 June 2017 until date of proceeding						
First Placement	Tranche 1 Cleansing Notice **4 July 2017 until date of proceeding**	There was no further information concerning GetSwift that a reasonable person would expect to have a material effect on the price or value of GetSwift's shares which GetSwift had not disclosed to the ASX prior to submitting the Tranche 1 Cleansing Notice	Y [2363]	Y [2364]–[2365]	Y [2362], [2368]	Y [2362], [2368]	Y [2362], [2368]
	Tranche 2 Cleansing Notice **16 Aug 2017 until date of proceeding**	There was no further information concerning GetSwift that a reasonable person would expect to have a material effect on the price or value of GetSwift's shares which GetSwift had not disclosed to the ASX prior to submitting the Tranche 2 Cleansing Notice	Y [2367]	Y [2367]	Y [2366], [2368]	Y [2366], [2368]	Y [2366], [2368]
Fantastic Furniture	Fantastic Furniture Agreement Representations **23 Aug 2017 until date of proceeding**	(a) any trial period with Fantastic Furniture had been successfully completed	Y [2371]–[2372]	Y [2374]–[2375]	Y [2386]	Y [2386]	Y [2386]
		(b) the Fantastic Furniture Agreement was unconditional	Y [2371]–[2372]	Y [2374]–[2375]			
		(c) Fantastic Furniture had entered into an agreement with GetSwift which: (i) Fantastic Furniture could not terminate for convenience; (ii) further or alternatively, required Fantastic Furniture to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; (iii) further or alternatively, was for a term of two or more years	Y [2371]–[2372]	Y [2374]–[2375]			
	Fantastic Furniture Quantifiable	The financial benefit to GetSwift from the Fantastic Furniture Agreement was secure, quantifiable and measurable	Y [2377]	Y [2377]	Y [2386]	Y [2386]	Y [2386]

	Benefit Representation **23 Aug 2017 until date of proceeding**						
	Fantastic Furniture No Termination Representation **22 Sept 2017 until date of proceeding**	(a) the Fantastic Furniture Agreement had not been terminated	Y [2379]–[2382]	Y [2379]–[2382]	Y [2386]	N/A	N [2382]
		(b) GetSwift continued to have an agreement with Fantastic Furniture which required Fantastic Furniture to use GetSwift exclusively for its last-mile delivery services for a period of two or more years	Y [2379]–[2382]	Y [2379]–[2382]			
		(c) Fantastic Furniture had successfully trialled the GetSwift Platform	Y [2379]–[2382]	Y [2379]–[2382]			
		(d) the statements in the Fantastic Furniture & Betta Homes Announcement that GetSwift had signed an "exclusive commercial multi-year agreement" with Fantastic Furniture continued to be true	Y [2379]–[2382]	Y [2379]–[2382]			
	Second Fantastic Furniture No Termination Information **30 Nov 2017 until date of proceeding**	The Fantastic Furniture Agreement had not been terminated	Y [2385]	Y [2385]	Y [2386]		N [2385]
Betta Homes	Betta Homes Agreement Representation **23 Aug 2017 until date of proceeding**	(a) any trial period with Betta Homes had been successfully completed	Y [2389]–[2390]	Y [2392]–[2393]	Y [2408]	Y [2408]	Y [2408]
		(b) the Betta Homes Agreement was unconditional	Y [2389]–[2390]	Y [2392]–[2393]			
		(c) Betta Homes had entered into an agreement with GetSwift which Betta Homes (i) could not terminate	Y	Y			

		for convenience; (ii) further or alternatively, required Betta Homes to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and (iii) further or alternatively, was for a term of two or more years	[2389]–[2390]	[2392]–[2393]			
	Betta Homes Quantifiable Benefit Representation **23 Aug 2017 until date of proceeding**	The financial benefit to GetSwift from the Betta Homes Agreement was secure, quantifiable and measurable	Y [2395]	Y [2395]	Y [2408]	Y [2408]	Y [2408]
	Betta Homes Financial Benefit Representation **24 Jan 2018 until date of proceeding**	(a) any trial period with Betta Homes had been successfully completed	Y [2397]–[2402]	Y [2404]	Y [2408]	N [2407]	N [2407]
		(b) the Betta Homes Agreement was unconditional	Y [2397]–[2402]	Y [2404]			
		(c) the Betta Homes Agreement had commenced with a term of two or more years	Y [2397]–[2402]	Y [2404]			
		(d) Betta Homes had made, and might continue to make, deliveries using the GetSwift Platform	Y [2397]–[2402]	Y [2404], [2406]			
		(e) Betta Homes was continuing to engage with GetSwift	Y [2397]–[2402]	Y [2404]			
		(f) the statement in the Fantastic Furniture & Betta Homes Announcement namely that GetSwift had "signed an exclusive commercial multi-year agreement" with Betta Homes continued to be true	Y [2397]–[2402]	N [2405]			
		(g) by reason of the preceding six matters, it was likely that GetSwift would receive a financial benefit from the Betta Homes Agreement	Y [2397]–[2402]	Y [2404], [2406]			

Bareburger	Bareburger Agreement Representations **30 August 2017 until date of proceeding**	(a) any trial period with Bareburger had successfully been completed	Y [2411]–[2412]	Y [2414]–[2415]	Y [2421]	Y [2421]	Y [2421]
		(b) the Bareburger Agreement was unconditional	Y [2411]–[2412]	Y [2414]–[2415]			
		(c) Bareburger had entered into an agreement with GetSwift which: (i) Bareburger could not terminate for convenience; (ii) further or alternatively, required Bareburger to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and (iii) further or alternatively was for a term of two or more years	Y [2411]–[2412]	Y [2414]–[2415]			
	Bareburger Price Sensitivity Representation **30 August 2017 until date of proceeding**	(a) GetSwift had reasonable grounds to expect that the Bareburger Agreement was likely to have a material effect on either the price or value of GetSwift's shares	Y [2417]	Y [2417]	Y [2421]	Y [2421]	Y [2421]
		(b) alternatively, that the Bareburger Agreement was likely to have a material effect on either the price or value of GetSwift's shares	Y [2417]	Y [2417]			
	Bareburger Quantifiable Benefit Representation **30 August 2017 until date of proceeding**	The financial benefit to GetSwift of the Bareburger Agreement was secure, quantifiable and measurable	Y [2419]–[2420]	Y [2419]–[2420]	Y [2421]	Y [2421]	Y [2421]
NA Williams	First NAW Agreement Representations **12 September 2017 until date of proceeding**	(a) any trial period with NA Williams or NAW Clients had been successfully completed	Y [2424]–[2425], [2426], [2428], [2431]	Y [2438]	Y [2458]	Y [2458]	Y [2458]
		(b) NA Williams had entered into an agreement with GetSwift which: (i) NA Williams could not terminate for convenience; (ii) further or alternatively, required NA Williams to use GetSwift exclusively for its last-	Y [2424]–[2425], [2426], [2429], [2433]	Y [2439]			

		mile delivery services for a period of five years; (iii) further or alternatively, was for a term of five years					
		(c) the NAW Agreement could, and would, generate revenue without GetSwift entering into individual agreements with any NAW Clients	Y [2424]–[2425], [2426], [2430], [2434]	Y [2440]			
		(d) GetSwift had reasonable grounds for making the NAW Transaction Projection	Y [2427], [2435]	Y [2441]–[2444]			
		(e) further or alternatively to subparagraph (d), GetSwift had reasonable grounds for making the NAW Revenue Projection	Y [2427], [2435]	Y [2445]–[2448]			
	NAW Quantifiable Benefit Representation **12 September 2017 until date of proceeding**	The financial benefit to GetSwift from the NAW Agreement was secure, quantifiable and measurable	Y [2450]–[2451]	Y [2450]–[2451]	Y [2458]	Y [2458]	Y [2458]
	Second NAW Agreement Representations **31 October 2017 until date of proceeding**	(a) GetSwift repeated the First NAW Agreement Representations	Y [2453]–[2454]	Y [2456]–[2457]	Y [2458]	Y [2458]	Y [2458]
		(b) NA Williams was a client of GetSwift and not an agent or representative of GetSwift or an agent or representative for another party	Y [2453]–[2454]	Y [2456]–[2457]			
		(c) GetSwift could, and would, provide NA Williams with access to the GetSwift Platform pursuant to the NAW Agreement	Y [2453]–[2454]	Y [2456]–[2457]			
		(d) NA Williams could, and would, itself use the GetSwift Platform under the NAW Agreement	Y [2453]–[2454]	Y [2456]–[2457]			
		(e) the NAW Agreement could, and would, generate revenue without GetSwift entering into individual agreements with each NAW Client	Y [2453]–[2454]	Y [2456]–[2457]			

		(f) that the statements in the Second NAW Announcement, specifically "[GetSwift] has signed an exclusive commercial 5 year agreement with NA Williams…the leading representative group for the North American Automotive Sector", the NAW Transaction Projection and the NAW Revenue Projection, continued to be true	Y [2453]–[2454]	Y [2456]–[2457]			
Johnny Rockets	Johnny Rockets Agreement Representations **25 October 2017 until date of proceeding**	(a) any trial period with Johnny Rockets had been successfully completed	Y [2464]–[2465], [2463], [2467]	Y [2469]–[2470]	Y [2482]	Y [2482]	Y [2482]
		(b) the Johnny Rockets Agreement was unconditional	Y [2463], [2467]	Y [2469]–[2470]			
		(c) the Johnny Rockets Agreement had commenced with a term of two or more years	Y [2463], [2467]	Y [2469]–[2470]			
		(d) Johnny Rockets had entered into an agreement with GetSwift which: (i) Johnny Rockets could not terminate for convenience; (ii) further or alternatively, required Johnny Rockets to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and (iii) further or alternatively, was for a term of two or more years	Y [2463], [2467]	Y [2469]–[2470]			
		(e) that GetSwift had reasonable grounds for making the Johnny Rockets Projection	Y [2461]–[2462], [2463], [2467]	Y [2471]			
	Johnny Rockets Price Sensitivity Representation **25 October 2017 until date of proceeding**	(a) GetSwift had reasonable grounds to expect that the Johnny Rockets Agreement was likely to have a material effect on either the price or value of GetSwift's shares	Y [2474]	Y [2474]	Y [2482]	Y [2482]	Y [2482]
		(b) Alternatively, the Johnny Rockets Agreement was likely to have a material effect on either the price or value of GetSwift's shares	Y [2474]	Y [2474]			

	Johnny Rockets Quantifiable Benefit Representation **25 October 2017 until date of proceeding**	The financial benefit to GetSwift of the Johnny Rockets Agreement was secure, quantifiable and measurable	Y [2476]–[2477]	Y [2476]–[2477]	Y [2482]	Y [2482]	Y [2482]
	Johnny Rockets No Termination Representations **9 January 2018 until date of proceeding**	(a) the Johnny Rockets Agreement had not been terminated	Y [2479]–[2481]	Y [2479]–[2481]	Y [2482]	N [2481]	N [2481]
		(b) GetSwift continued to have an agreement with Johnny Rockets which required Johnny Rockets to use GetSwift exclusively for its last-mile delivery services	Y [2479]–[2481]	Y [2479]–[2481]			
		(c) the statement in the Johnny Rockets Announcement that GetSwift had signed an exclusive multi-year agreement with Johnny Rockets continued to be true	Y [2479]–[2481]	Y [2479]–[2481]			
Yum	Yum MSA Representations **1 December 2017 until date of proceeding**	(a) any trial period or limited roll out with Yum had been successfully completed	N [2486]–[2487], [2489]–[2490]	N	Y [2508]	Y [2508]	Y [2508]
		(b) Yum had entered into an agreement with GetSwift which: (i) Yum was not permitted to terminate for convenience; (ii) further or alternatively, required Yum to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; (iii) further or alternatively, was for a term of two or more years; (iv) further or alternatively, allowed GetSwift to provide its services to Yum and Yum Affiliates immediately	Y (b)(i)–(iii) [2486]–[2487], [2491] N (b)(iv) [2486]–[2487], [2491]–[2493]	Y (b)(i)–(iii) [2498]–[2499]			
		(c) GetSwift had reasonable grounds for making the Yum Deliveries Projection	Y [2486]–[2487], [2494]–[2495]	Y [2500]			

		(d) GetSwift had reasonable grounds for making the Yum Rollout Projection	Y [2486]–[2487], [2494]–[2495]	Y [2501]			
	Yum Price Sensitivity Representations **1 December 2017 until date of proceeding**	(a) GetSwift had reasonable grounds to expect that the Yum MSA was likely to have a material effect on either the price or value of GetSwift's shares	Y [2503]–[2505]	Y [2503]–[2505]	Y [2508]	Y [2508]	Y [2508]
		(b) alternatively, the Yum MSA was likely to have a material effect on either the price or value of GetSwift's shares	Y [2503]–[2505]	Y [2503]–[2505]			
	Yum Quantifiable Benefit Representation **1 December 2017 until date of proceeding**	The financial benefit to GetSwift from the Yum MSA was secure, quantifiable and measurable	Y [2507]	Y [2507]	Y [2508]	Y [2508]	Y [2508]
Amazon	Amazon MSA Representations **1 December 2017 until date of proceeding**	(a) any trial period or limited roll out with Amazon had been successfully completed	Y [2511]–[2513]	Y [2511]–[2513]	Y [2516]	Y [2516]	Y [2516]
		(b) Amazon had entered into an agreement with GetSwift which Amazon could not terminate for convenience	Y [2511]–[2513]	Y [2511]–[2513]			
	Amazon Quantifiable Benefit Representation	The financial benefit to GetSwift of the Amazon MSA was secure, quantifiable and measurable	Y [2515]	Y [2515]	Y [2516]	Y [2516]	Y [2516]

	10:10am to 6:15pm on 1 December 2017						
Second Placement	Second Placement Cleansing Notice Representation **22 December 2017 to date of proceeding**	There was no information concerning GetSwift that a reasonable person would expect to have a material effect on the price or value of GetSwift's shares which GetSwift had not disclosed to the ASX prior to submitting the Second Placement Cleansing Notice	Y [2519]–[2521]	Y [2519]–[2521]	Y [2518], [2522]	Y [2518], [2522]	Y [2518], [2522]

I.1 Statutory scheme and applicable principles

I.1.1 *General principles*

2106 Section 1041H(1) of the *Corporations Act* provides:

> A person must not, in this jurisdiction, engage in **conduct, in relation to a financial product** or a financial service, that is misleading or deceptive or is likely to mislead or deceive.
>
> (Emphasis added).

2107 A financial product includes securities: ss 764A(1)(a) and 761A of the *Corporations Act*. The reference to "conduct in relation to a financial product" is defined to include "issuing a financial product" (s 1041H(2)(b)(i)) or "publishing a notice in relation to a financial product" (s 1041H(2)(b)(ii)).

2108 The relevant principles are well known but it is useful to set them out briefly.

2109 A useful two-step analysis for misleading and deceptive conduct was provided by Gordon J in *Australian Competition and Consumer Commission (ACCC) v Telstra Corporation Ltd* [2007] FCA 1904; (2007) 244 ALR 470 (at 474 [14]–[15]):

> 14. A two-step analysis is required. First, it is necessary to ask whether each or any of the pleaded representations is conveyed by the particular events complained of: *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45; 169 ALR 677; 46 IPR 481; [2000] HCA 12 at [105] (*Nike*); *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) 49 ACSR 369; 61 IPR 420; [2004] ATPR 42-000; [2004] FCAFC 90 at [18] per Dowsett J (with whom Jacobson and Bennett JJ agreed); *Astrazeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd* [2006] ATPR 42-106; [2006] FCAFC 22 at [37] ...
>
> 15. Second, it is necessary to ask whether the representations conveyed are false, misleading or deceptive or likely to mislead or deceive. This is a "quintessential question of fact": *Australian Competition and Consumer Commission v Telstra* (2004) 208 ALR 459; [2004] FCA 987 at [49].

2110 Whether conduct is misleading or deceptive, or is likely to mislead or deceive, is a question of fact, determined by reference to the relevant surrounding facts and circumstances, and by having regard to the conduct as a whole: *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592 (at 625 [109] per McHugh J); approved in *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 (at 341–342 [102] per Gummow, Hayne, Heydon and Kiefel JJ). The test is objective and a court must determine that question for itself: *Butcher* (at 625 [109] per McHugh J); *Campbell* (at 341–342 [102] per Gummow, Hayne, Heydon and Kiefel JJ).

2111 As has been made clear in many cases, the central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency or is apt to lead a person exposed to the conduct into error, that is, to form an erroneous assumption or conclusion about some fact or matter: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (at 198 per Gibbs CJ); *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (at 200 per Deane and Fitzgerald JJ).

2112 The making of a false or misleading representation is, obviously enough, conduct that may be misleading or deceptive: *Campbell* (at 341–342 [102] per Gummow, Hayne, Heydon and Kiefel JJ). It follows that even though a person may have lacked any intention to mislead or deceive, they may be found to have engaged in conduct that is misleading or deceptive, or likely to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 (at 228 per Stephen J, with whom Barwick CJ at 221 and Jacobs J at 232 agreed; at 234 per Murphy J).

2113 In this context, the word "likely" means a real and not remote chance that relevant persons will be misled or deceived: *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 (at 87 per Bowen CJ, Lockhart and Fitzgerald JJ).

2114 A statement that is literally true may nonetheless be misleading or deceptive: *Hornsby* (at 227 per Stephen J). Hence a document may be misleading, even if a full and perfect understanding of its contents would not create that effect: *National Exchange Pty Ltd v Australian Securities and Investments Commission (ASIC)* [2004] FCAFC 90; (2004) 49 ACSR 369 (at 378 [36] per Dowsett J).

2115 In relation to the sale of securities in the market, the relevant conduct is directed to the public at large, rather than a specific individual. As such, the Court is required to determine whether "ordinary" or "reasonable" members of the class of individuals to whom the conduct was directed at would be misled or deceived: see *Google Inc v Australian Competition and Consumer Commission (ACCC)* [2013] HCA 1; (2013) 249 CLR 435 (at 443 [7] per French CJ, Crennan and Kiefel JJ). In isolating the "ordinary" or "reasonable" members of that class, certain characteristics are objectively attributed, notwithstanding the class is expected to include a wide range of persons: *Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45 (at 85 [102]–[103] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

2116 In *Forrest*, in respect of a company's letters to the ASX and related media release, the intended audience of the company's communications was found to be "investors (both present and possible future investors) and perhaps, as some wider section of the commercial or business community": *Forrest* (at 506 [36] per French CJ, Gummow, Hayne and Kiefel JJ).

I.1.2 *Continuing representations*

2117 Speaking generally, the relevant time period as to a continuing representation encompasses the period between the point in time when the representation is made and the point in time it is acted upon, but depending on the circumstances which occur following the date upon which the representation is made, a representation may become spent. In determining whether a representation is "continuing", context is critical. One must look to the circumstances in which the representation was made as well as later circumstances during the period in which the representation is open to be acted upon: *Australian Securities and Investments Commission (ASIC) v Sydney Investment House Equities Pty Lt*d [2008] NSWSC 1224; (2008) 69 ACSR 1 (at 76 [432]). A representation is "continuing" when in all the circumstances, it is taken to have been repeatedly or even continuously made, or remade: *McGrath v Australian Natural Care* [2008] FCAFC 2; (2008) 165 FCR 230 (at 267 [148] per Allsop J).

2118 In this regard, it is obviously of importance that representations made about a listed entity are made in the context of both a periodic and a continuous disclosure regime. A further aspect of this context is the reasonable expectation that a listed entity will not only act lawfully in complying with an obligation to make any material disclosures (including correcting information that is no longer accurate, if it is material) but also to act consistently with the way in which it has represented to the market that it will act in relation to this obligation of disclosure, for example, by way of a continuous disclosure policy. This is an aspect of the obvious point that to determine whether silence will amount to misleading conduct, one must focus on the reasonable expectations of the target audience: *Myer Holdings* (at 287 [1482] per Beach J). Silence will generally not be misleading "unless the circumstances … give rise to the reasonable expectation that if some relevant fact exists it would be disclosed": *Myer Holdings* (at 287 [1482] per Beach J), citing *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 (at 41 per Gummow J); *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; (2010) 241 CLR 357 (at 369 [17]–[19] per French CJ and Kiefel J). Consistently with this, speaking generally, it is a reasonable expectation that a listed entity will

not be silent where it has an obligation to make continuous disclosure under s 674 of the *Corporations Act* and the Listing Rules: see *Myer Holdings* (at 288 [1488] per Beach J).

I.1.3 *Representations made by an officer*

2119 Section 1041H of the *Corporations Act* refers to "a person" who engages in conduct. The relevant issue in relation to this section (in terms of the law) concerns the circumstances in which an individual will personally contravene s 1041H by conduct engaged in during the course of the corporation's affairs.

2120 It is evident that an individual may contravene s 1041H (or equivalent) as a principal by conduct engaged in by the individual in the course of a corporation's affairs: *Australian Securities and Investments Commission (ASIC) v Narain* [2008] FCAFC 120; (2008) 169 FCR 211 (at 216–217 [19] per Finkelstein J; at 225 [98] per Jacobson and Gordon JJ); *Houghton v Arms* [2006] HCA 59; (2006) 225 CLR 553 (at 566–568 [40], [46] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Swiss Re International SE v Simpson* [2018] NSWSC 233; (2018) 354 ALR 607 (at 695 [527] per Hammerschlag J).

2121 The ultimate question, which is not in dispute between the parties, is whether all of the elements of the contravention are made out against the relevant individual in his own right, or whether he merely acted as a corporate organ, thereby binding the company but not himself personally: *Narain* (at [96] per Jacobson and Gordon JJ). This is a question of fact: *Narain* (at 225 [96]–[97]). In *Narain*, Jacobson and Gordon JJ (with whom Finkelstein J agreed) held that "it is plain in our view that Mr Narain was personally liable for any contravention of s 1041H" (at 225 [100]). In those circumstances, Mr Narain was the managing director who had: (a) participated in the preparation and drafting of an ASX announcement; (b) adopted and approved its contents; and (c) authorised and directed the transmission of it to the ASX: *Narain* (at 225 [98]–[100]).

2122 Nonetheless, the parties reach contradictory positions as to the proposition to be drawn from *Narain*. Mr Hunter contends that the decision does not stand for the proposition that "an individual who merely contributes to the drafting of a misleading announcement subsequently published by the company will contravene s 1041H".[2703] In this regard, he relies on the decision

[2703] HCS at [53].

of Hammerschlag J in *Swiss Re*. In that case, the relevant individuals were not found to be personally liable because the company's mind and direction were held to be a "collective effort": *Swiss Re* (at 699 [562]). From this, Mr Hunter argues that if an announcement is considered to be the result of collective action, then the conduct of an individual (even if it involves a material contribution) in making that announcement, does not make it the act of the individual.[2704] Mr Hunter further contends that in circumstances where there has been misleading non-disclosure, an individual will only be personally liable where the failure of the company to make a disclosure can "fairly be said to flow from [the relevant individual's] inaction" and not where the individual was only one, among many other, human embodiments of the company: *Swiss Re* (at 695 [528]–[529]).[2705]

2123 Mr Macdonald contends that *Narain* stands for the proposition that an officer of a company will only be personally liable if the officer "has a sufficient degree of participation in the conduct of the company to be acting as more than a mere corporate organ".[2706] He accepts that "his participation in the process by which the original representation was drafted, approved and released is relevant to the assessment of his personal liability arising from GetSwift's conduct in making the announcement".[2707] In relation to those non-disclosures said to be *continuing* or occurring *after* the relevant ASX announcements, Mr Macdonald says that simply participating in the approval of announcements does not make him personally liable for every contravening non-disclosure by GetSwift and that he is not responsible for non-disclosures at large.[2708] Indeed, it is said that ASIC has not particularised any conduct or omission on the part of Mr Macdonald after the release of a particular announcement beyond a general allegation that Mr Macdonald failed to cause GetSwift to disclose further information or withdraw the announcement.[2709] Given this, it is said that personal liability for GetSwift's conduct should be limited to the "*making* of that relevant announcement to the extent that ASIC can establish he was liable for that conduct in the *ASIC v Narain* sense".[2710]

[2704] HCS at [56].
[2705] HCS at [59]–[60].
[2706] MCS at [55].
[2707] MCS at [63].
[2708] MCS at [59]–[64].
[2709] MCS at [58].
[2710] MCS at [66].

2124 Despite some suggestion to the contrary, it does not seem to me that *Swiss Re* and *Narain* are inconsistent. Nothing in *Swiss Re* undermines the approach in *Narain*, which is whether all of the elements of the contravention are made out against the individual or whether the individual merely acted as a corporate organ, binding the company but not the person. The fundamental problem with relying upon *Swiss Re* in the way that Mr Hunter contends is that it seeks to elevate the application of principle in a particular case to a statement of principle. The outcome in *Swiss Re* was wholly fact specific: the reason why the Managing Director/Chief Executive Officer and the Chief Financial Officer, who had made an announcement, were held *not* to be liable was because Hammerschlag J found that neither of them could be regarded as the embodiment of the company in making that particular announcement and neither of them were the principal of the company, or even its directing mind on their own: *Swiss Re* (at 699 [562]). This finding, of course, was made in circumstances where the announcement had been drafted during the course of a number of board meetings, where external lawyers had provided advice to the board, and where the draft announcement had been tabled, and the content agreed upon, by the board: see *Swiss Re* (at 616–619 [75]–[91]). Justice Hammerschlag further found that the Executive General Manager of Finance, who had failed to disclose particular matters in a telephone conversation with insurers, had undertaken conduct *only* on behalf of his employer and was "not the principal of [his employer], its mind, or directing it": *Swiss Re* (at 695 [527]). In this specific factual context, the Executive General Manager of Finance was only "one, amongst many other potential human embodiments of [his employer]" and that he was not the "one on [his employer's] behalf to disclose" the omitted information: *Swiss Re* (at 695 [529]).

2125 The present matter is quite a different case than *Swiss Re* for two reasons. *First*, in *Swiss Re*, the employees (including senior executive officers) made statements and did not disclose materials in the course of their executive duties. In the present case, Mr Hunter and Mr Macdonald acted in their roles as Executive Chairman and Executive Director under the Continuous Disclosure Policy, which reposed in them and in the Board responsibility for making accurate disclosures: see [29]–[30], [1919]. As a result, in relevant respects, Mr Hunter and Mr Macdonald's conduct occurred by reason of them being the "human embodiment" of the directing mind of GetSwift.[2711]

[2711] ASIC Reply at [159].

2126 *Secondly*, in *Swiss Re*, the announcements were drafted as a result of a "collective effort" of the board. In the present case, as noted above (see [1915]–[1922]), Mr Hunter and Mr Macdonald exercised extensive control over the commercial dealings of GetSwift. They drafted, edited, and authorised the transmission of the ASX announcements, marginalised Ms Gordon and others, including ignoring their suggestions, informed Ms Cox that ASX announcements were not to be released without their approval, did not always seek Mr Eagle's input prior to the release of an announcement, and discouraged other members of the board from raising queries: see [1808]–[1922]. There was no real "collective effort" involving the other directors of GetSwift. I recognise that Mr Hunter played a more active role in the initial drafting of the ASX announcements, and it is important not to elide the roles of the two actors, as I have outlined above; nevertheless, Mr Macdonald was deeply involved. He played a critical role in the negotiation of client agreements and, importantly, the editing, approval and authorisation of ASX announcements *alongside* Mr Hunter. see [1914]–[1957].

2127 Indeed, Mr Hunter and Mr Macdonald circulated some draft ASX announcements to the board before being released, and in a minority of cases, their intentions were to release "if there are no material objections" (see CITO (at [532])), "as long as there are no objections" (see Hungry Harvest (at [569])), or "review … if you see materiel [*sic*] errors": see NA Williams (at [775]). However, I do not consider that the evidence reveals that they were, in any real way, seeking approval or authorisation. Consistent with the approach in *Narain*, their actions should be seen as, in effect, an invitation to the other directors to correct superficial mistakes or contribute general comments, which is best seen as a factor consistent with a finding that they engaged in the conduct personally: *Narain* (at 220 [49]–[51] per Jacobson and Gordon JJ).

2128 This conclusion is strengthened in light of Ms Gordon's evidence. She perceived she would be met with significant resistance upon raising a concern in relation to an announcement: see [581], and [588]–[590]. Similarly, when, during the 13 June 2017 Board meeting Ms Gordon asked Mr Hunter and Mr Eagle to reduce the trenchant concerns expressed by them in writing so that she would have a fair opportunity to respond to the allegations that she had delayed the release of ASX announcements, Mr Hunter sought to ridicule Ms Gordon by stating words to

the effect of "let me put it in words in English you can understand".[2712] When Ms Gordon replied that, as a director, she believed she was accountable for announcements that were released without her total understanding, Mr Hunter said: "That's why you have director's insurance".[2713] Having accepted Ms Gordon's evidence, this particular aspect of it is consistent with the view formed by reference to the business records which reveal the close control exercised by the two men (and, in particular, Mr Hunter). It is also consistent with the view, revealed in considering the whole of the evidence, that neither Mr Hunter nor Mr Macdonald were interested in receiving comments from the board to the extent that they differed from their own views. This fortifies a conclusion that Mr Hunter and Mr Macdonald made the representations in relation to each ASX announcement personally. Further, as is evident from my specific findings in relation to the announcements made with regard to each of the Enterprise Clients above, in each case, Mr Hunter and Mr Macdonald were acting in their personal capacity as opposed to being merely part of the corporate organ.

2129 Further, to the extent Messrs Hunter and Macdonald contend that they are not responsible for those non-disclosures said to be *continuing* or occurring *after* the relevant ASX announcements as ASIC has not particularised any conduct or omission on their part following the release of the relevant ASX announcement, I disagree. *First*, the Continuous Disclosure Policy reposed in them, and in the Board responsibility for making accurate disclosures, including *corrective* disclosures. Indeed, it is risible for Messrs Hunter and Macdonald to contend that once they made a misleading announcement to the ASX, they should not be liable for a continuing representation because there is no evidence to demonstrate what they did. The problem is that they did nothing; doing nothing was the problem. *Secondly*, and in any event, when one gets to the Agreement after Trial Representations and the Quantifiable Benefit Representations, the issue is compounded by the fact that further announcements were being made to the ASX which contradicted the actual state of affairs.

I.1.4 *Section 12DA of the ASIC Act*

2130 ASIC argues that GetSwift, Mr Hunter and Mr Macdonald also engaged in contraventions of s 12DA of the *ASIC Act*. This section states that a person must not, in trade or commerce,

[2712] T247.35–37 (Day 4).
[2713] T248.1–2 (Day 4).

engage in conduct in relation to "financial services" that is misleading or deceptive or is likely to mislead or deceive. The same principles as to whether conduct is misleading or deceptive, or likely to mislead or deceive (as set out at [2106]–[2116]) are applicable. The question of whether s 12DA applies can be answered by assessing whether the conduct was in relation to "financial services".

2131 The words "in relation to" are of broad import and the degree of connexion between the two subject matters varies according to the subject matter: *ActiveSuper* (at 243 [349] per White J).

2132 Section 5 of the *ASIC Act* states that, for the purposes of Div 2 of Pt 2, the terms "financial product" and "financial service" have the meaning given by ss 12BAA and 12BAB respectively. Relevantly, a "security" is a "financial product": s 12BAA(7) of the *ASIC Act*.

2133 A "financial service" is provided by a legal person in the following circumstances: s 12BAB(1) of the *ASIC Act*:

> **12BAB Meaning of financial service**
>
> *When does a person provide a financial service?*
>
> (1) For the purposes of this Division, subject to paragraph (2)(b), **a person provides a financial service** if they:
>
> (a) provide **financial product advice** (see subsection (5)); or
>
> (b) deal in a **financial product** (see subsection (7)); …

(Emphasis added).

2134 The meaning of "service" is provided in s 12BA(1) of the *ASIC Act*:

> **12BA Interpretation**
>
> (1) In this Division, unless the contrary intention appears:
>
> …
>
> ***services*** includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce but does not include:
>
> (a) the supply of goods within the meaning of the *Competition and Consumer Act 2010*; or
>
> (b) the performance of work under a contract of service.
>
> …

2135 The expression "deal in a financial product" used s 12BAB(1)(b), is given content in s 12BAB(7) of the *ASIC Act*:

(7) For the purposes of this section, the following conduct constitutes ***dealing*** in a financial product:

(a) applying for or acquiring a financial product;

(b) **issuing a financial product;**

(c) in relation to securities or interests in managed investment schemes-underwriting the securities or interests;

(d) varying a financial product;

(e) disposing of a financial product.

…

(Emphasis added).

2136 GetSwift, Mr Hunter and Mr Macdonald accept that their conduct was in relation to "financial products" within the meaning of s 1041H of the *Corporations Act*, namely, shares in GetSwift, however, they do not accept that their conduct was conduct in trade or commerce in relation to "financial services" within the meaning of s 12DA(1) of the *ASIC Act*.[2714]

2137 But when the broad meaning of the word "dealing" is read in conjunction with s 12BAB(7)(b) of the *ASIC Act*, it is tolerably clear that s 12DA of the *ASIC Act* applies to conduct that is in relation to any dealing in issuing a financial product, such as a placement or issue of shares.

2138 Two cases, not referred to by the parties, are of some assistance in reaching this conclusion.

2139 The *first* is the case of *Ambergate Ltd v CMA Corp Ltd (Administrators Appointed)* [2016] FCA 94; (2016) 110 ACSR 642. In that case, Ambergate relied, when making the first share purchase, on allegedly misleading and deceptive public statements made by or on behalf of CMA Corporation Ltd (**CMA**), a publicly listed company. It again relied, in making the second share purchase, on all of those statements and further statements. Justice Buchanan said the following in relation to a claim made under s 12DA of the *ASIC Act* against CMA (at 652–653 [56]):

> In my view, on the facts of the present case, the statements upon which Ambergate sues are **connected with the issue of shares**. **They concern dealing in, or arranging for someone to deal in, financial products and therefore relate to the provision of financial services.** Section 52 of the TP Act does, therefore, not apply to them. **Section 12DA of the ASIC Act would apply. So, also, may s 1041H of the Corporations**

[2714] Defences at [41], [55], [68], [89], [109], [124], [152], [173], [196], [219], [241], [260], [264S], [264PP], and [265].

> **Act.** If I am wrong, then s 52 of the TP Act applies. It makes no real difference. On the findings I make later, however, more detailed examination of those complexities is not required.
>
> (Emphasis added).

2140 *Secondly*, in *Australian Securities and Investments Commission (ASIC) v Cycclone Magnetic Engines Inc* [2009] QSC 58; (2009) 224 FLR 50, ASIC alleged that each respondent engaged in misleading or deceptive conduct in relation to the issue of shares, contrary to s 1041H of the *Corporations Act* and ss 12DA and 12DB of the *ASIC Act*. Justice Martin (at 94 [152]) cited the following paragraph from *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1; (2007) 231 CLR 160 (at 214 [135] per Hayne JA):

> Justice Hayne (with whom Kirby J (on this point), Heydon and Crennan JJ agreed) said:
>
> > **A person who buys, or subscribes for, shares in a company, relying upon misleading or deceptive information from the company**, or misled as to the company's worth by its failure to make disclosures required by law, **may have a claim for damages against the company**. That claim may be framed in the tort of deceit but, more probably than not, will now be framed as a claim under consumer protection provisions of the *Trade Practices Act 1974 Cth* (ss 52, 82) or investor protection provisions of the *Corporations Act 2001 Cth* (eg, ss 1041H, 1041I and 1325) (the 2001 Act) or the *Australian Securities and Investments Commission Act 2001 Cth* (eg, ss 12DA, 12GF and 12GM) (the *ASIC Act*).
>
> (Emphasis added).

2141 Martin J subsequently concluded (at 94 [153]):

> The availability of s 12DA to an investor has been made plain. It follows, then, that the conduct I have found above also contravenes s 12DA of the ASIC Act.

2142 On the facts of the present case, I am satisfied that ASIC is suing upon alleged misleading statements which are "connected with the issue of shares". The statements were made to a market which dealt with the shares of the entity. GetSwift was thus "dealing in financial products". Since "dealing in a financial product" is a means by which a person can "provide a financial service" under s 12BAB(1) of the *ASIC Act*, I am satisfied that the relevant conduct in this case is subject to s 12DA of the *ASIC Act*.

I.1.5 *Future representations*

2143 A representation may be as to a present state of affairs, or it may be as to a future matter. In relation to the latter, s 12BB(1) of the *ASIC Act* states that a representation that is made by a person as to any future matter (including the doing of, or the refusing to do, any act), without

reasonable grounds, is taken to be misleading under s 12DA of the *ASIC Act*. The relevant section states:

> **12BB Misleading representations with respect to future matters**
>
> (1) If:
>
> (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
>
> (b) the person does not have reasonable grounds for making the representation;
>
> **the representation is taken, for the purposes of Subdivision D (sections 12DA to 12DN), to be misleading**.
>
> (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:
>
> (a) a party to the proceeding; or
>
> (b) any other person;
>
> the party or other person is taken not to have had reasonable grounds for making the representation, **unless evidence is adduced to the contrary**.
>
> (Emphasis added).

2144 Section 12BB(2) of the *ASIC Act* is a deeming provision. I will deal with the position taken by the parties as to the effect of the provision in deference to the detailed submissions I received, although except in a limited way, it does not significantly matter.

2145 As is evident from the above, a representor does not have reasonable grounds for making the representation unless "evidence is adduced to the contrary". Sections 12BB(3) and (4) provide clarification as to the operation of subsections (1) and (2) of the section:

> (3) To avoid doubt, subsection (2) does not:
>
> (a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
>
> (b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.
>
> (4) Subsection (1) does not by implication limit the meaning of a reference in this Division to:
>
> (a) a misleading representation; or
>
> (b) a representation that is misleading in a material particular; or
>
> (c) conduct that is misleading or is likely or liable to mislead;

> and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

2146 ASIC's case relies on the effect of this deeming provision. For instance, to the extent that a representation made by GetSwift was a representation as to a future matter, ASIC says that because "no evidence has been adduced to the contrary" by GetSwift, for the purposes of s 12DA of the *ASIC Act*, it is misleading.[2715]

2147 GetSwift takes some issue with this approach and contend that ASIC's submissions overstate the significance and operation of s 12BB in the circumstances of this case.[2716] In essence, GetSwift submits that subs (2) has only a limited effect. It does not reverse the onus of proof but simply imposes a "modest evidential burden" which, once discharged, leaves a legal or persuasive onus with ASIC.[2717]

2148 GetSwift refers to the legislative history of s 12BB of the *ASIC Act*, which followed that of s 51A of the former *TPA* and s 4 of the *Competition and Consumer Law Act 2010* (Cth) Sch 2 (***Australian Consumer Law***). Relevantly, when s 12BB was originally enacted, it did not include a provision in the terms of subs (3) above. It thus followed the old form of s 51A of the *TPA*, which also did not contain the provision.

2149 In relation to s 51A of the *TPA*, there had been some debate as to whether the section reversed the onus of proof or simply imposed an evidential burden on the respondent. In *McGrath*, Allsop J held (at 282–283 [191]–[192]) that the section did not reverse the onus of proof. Instead, it imposed an evidential burden for evidence "to the contrary" to be adduced before the deeming provision ceased to operate.

2150 Similarly, *North East Equity Pty Ltd v Proud Nominees Pty Ltd* [2010] FCAFC 60; (2010) 269 ALR 262, the Full Court found (at 268–269 [29] per Sundberg, Siopis and Greenwood JJ) that the section imposed an evidential burden on a respondent. As to the operation of the provision, the Full Court observed (at 269 [33]):

> The deeming effect of subs (2) arises only when the representor fails to adduce evidence to the contrary; that is to say, some evidence that it had reasonable grounds

[2715] See, e.g., ACS at [1754].
[2716] GCS at [110].
[2717] GCS at [110].

> for making the representation. Once the representor discharges that evidential burden, the matter is thereafter dealt with under subs (1), the obligation being on the applicant to establish that the representor did not have reasonable grounds for making the representation.

2151 When s 4(3) of the *Australian Consumer Law* was enacted (which mirrors s 12BB(3) of the *ASIC Act*), the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) (at 24 [2.22]–[2.23]) explained that the provision clarified that "the burden of proof under this section is evidentiary in nature and does not place a legal burden on defendants to prove that representations were not misleading" and that "[t]he clarification of the burden as requiring only evidence of reasonable grounds to be adduced is to reverse the effect of some past court decisions ... that have interpreted section 51A of the TP Act as requiring a respondent to prove that he, she or it had reasonable grounds".

2152 Section 12BB of the *ASIC Act* was amended at the same time as the amending Act that introduced the *Australian Consumer Law*: see Sch 3, Item 6 of the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth). The old s 12BB of the *ASIC Act* was repealed and substituted with the presently worded subs (3) (mirroring the terms of s 4 of the *Australian Consumer Law*).

2153 From this legislative history, it is evident that s 12BB of the *ASIC Act* does no more than impose an evidential burden on the representor. An evidential burden is not an "onus of disproof" and "does no more than oblige a party to show that there is sufficient evidence to raise an issue as to the existence (or non-existence) of a fact": *Momcilovic v R* [2011] HCA 34; (2011) 245 CLR 1 (at 242 [665] per Bell J).

2154 Moreover, s 12BB(2) does not say who must adduce the evidence or how much evidence must be adduced. Accordingly, as was the position with s 51A of the *TPA*, a respondent may rely upon any evidence, including that called by an applicant which answers the description "evidence to the contrary", including through cross-examination of the applicant's witnesses: *Fubilan Catering Services Ltd v Compass Group (Australia) Pty Ltd* [2007] FCA 1205 (at 207–208 [545] per French J); *Cycclone Magnetic Engines* (at 103–104 [193]–[194] per Martin J); *North East Equity* (at 268–269 [29]–[33] per Sundberg, Siopis and Greenwood JJ).

2155 In the light of the material tendered and the cross-examination that took place, GetSwift argues that the deeming effect under s 12BB of the *ASIC Act* can have no practical operation in the circumstances of this case.

2156 This submission should be broadly accepted so far as it goes towards the fact that s 12BB of the *ASIC Act* does not reverse the onus of proof; however, it is far from the end of the matter. The issue of whether or not the evidential onus imposed can be discharged arises in the light of the defendants' decision to go into evidence in only a very limited way.

2157 The questions that arise are: (a) whether the evidence actually adduced (largely by GetSwift) is, properly assessed, "evidence to the contrary", which taken together with any other evidence that emerged, discharges the relatively low threshold set by the deeming provision; and (b) whether upon all the evidence there were reasonable grounds for the relevant future representation.

2158 As Heerey J explained in *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 (at 513), if there is a representation as to a future matter, the onus imposed by the deeming provision requires the representor to show: (1) some facts or circumstances; (2) existing at the time of the representation; (3) *on which the representor in fact relied*; (4) which are objectively reasonable; and (5) which support the representation made.

2159 To similar effect, Allsop J in *McGrath* explained (at 282–283 [191]–[192]) that evidence "to the contrary" for the purposes of the deeming provision is "evidence that [tends] to establish, or that [admits] of the inference that there were, reasonable grounds for making the representation." It will be for the Court to determine whether the evidence adduced meets that requirement in a particular case.

2160 Heerey J's analysis in *Sykes* was approved by Mason P in *Botany Bay City Council v Jazabas Pty Ltd* [2001] NSWCA 94; [2001] ATPR 46-210 (at [84]). In explaining why his Honour considered the italicised proposition (3) above to be "implicit in the provisions", Mason P observed (at [85]):

> Were it otherwise, the sections would throw the inquiry into the full realm of the law of negligence, calling for consideration of what the representor ought to have taken into account, an inquiry that would track back into investigating the scope of any duty of care. *Rather, the sections effectively require the representor to identify the facts or circumstances (if any) actually relied upon* [proposition (3)] *before turning it over to the trier of fact to decide whether they were objectively reasonable* [proposition (4)] *and whether they support the representation made* [proposition (5)]...
>
> (Emphasis added).

2161 Hence, as Keane JA explained in *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 (at [128]), also in relation to the deeming provision in s 51A(2) of the *TPA*:

> The wording of s 51A(2) means that if the evidence adduced by a representor is not actually "to the contrary", ie., it does not tend to establish reasonable grounds for making the representation, then no evidence of the kind required by the section will have been adduced and there is no reason why the deeming provision contained in s 51(2) [sic: s 51A(2)] would not continue to operate. It would, of course, be a matter for the court to determine whether or not the evidence adduced was 'to the contrary'.

2162 The relevant task in the present case is to consider the limited evidence (and inferences available from that evidence) relied on by the defendants as demonstrating (or implying) an objectively reasonable basis for its decision makers to make the future representations pleaded, and any evidence that the identified basis in the evidence *was in fact relied upon* by the decision makers, relevantly Messrs Hunter and Macdonald.

2163 When the deeming provision is properly understood, it can be seen that in the usual case it will be a formidable task to prove what *in fact was relied upon* in making a future representation, when the person or persons responsible for making a representation (the decision makers) are not called; but for reasons that will become evident, the extent to which the alleged misleading and deceptive conduct will be determined by reference to onus is very limited.

I.2 Overarching findings

2164 ASIC contends that each of GetSwift, Mr Hunter and Mr Macdonald engaged in misleading and deceptive conduct. No case is brought against Mr Eagle. For a reason that does not seem to me to sit happily with the overarching purpose, it is alleged that each was involved in making a huge number of specific representations that, by act or omission, were inaccurate, incomplete, or for which they did not have reasonable grounds, concerning the nature and current status of the agreements, the price sensitivity of certain ASX announcements, and the extent to which GetSwift may receive any financial benefit from client agreements and whether that benefit was quantifiable.

2165 The specific representations (that is, those which relate directly to each Enterprise Client) are said to arise at the time when each of the corresponding ASX announcements was made. They must also be considered, it is said, in the light of the existing, and continuing, general representations which are alleged to have been made by GetSwift in relation to its business model and its approach to continuous disclosure, and were known to the market and form part of the relevant context. These general representations have been explained in an earlier part of these reasons (see [25]–[34]), but it is useful to set them out again briefly:

(1) Representations that relate to how GetSwift represented to investors that it would not enter into agreements with Enterprise Clients until *after* the "proof of concept" or trial period was completed. These include the First and Second Agreement After Trial Representations (collectively, the **Agreement After Trial Representations**).

(2) Representations that concern how GetSwift represented that it would *only* announce the entry into an agreement when the associated financial benefit to GetSwift was secure, quantifiable and measurable. These include the First, Second, and Third Quantifiable Announcements Representations (collectively, the **Quantifiable Announcements Representations**).

2166 Before addressing each of the contraventions, it is convenient to consider a number of overarching issues raised by GetSwift.

2167 *Mere Silence Contention:* GetSwift says that ASIC's case is, generally speaking, not one that is based on "any express representation", but on implied representations relating to the failure to disclosure certain alleged information. GetSwift submits that this raises questions as to whether the market would have reasonably expected the information to be disclosed.[2718] Indeed, it is said that "given the governing regulatory framework as to the making of disclosures, the market could only have reasonably expected GetSwift to disclose information that was material to the value of GetSwift's shares", relying on the reasoning of Beach J in *Myer Holdings* (at [1482]).[2719] The difficulty with this contention, however, is that, unlike the applicant's case in *Myer Holdings*, which was advanced on the basis that Myer was "continuing to *represent*, by its silence, its earlier statements", this is not a case that arises by mere silence: *Myer Holdings* (at [1467] per Beach J). It arises expressly or by implication from both express representations made to the market (Agreement After Trial and Quantifiable Announcements Representations), express statements made in the relevant ASX announcement (usually to the effect that GetSwift had signed an "exclusive multi-year contract"), and the omitted information.

2168 Accordingly, the current case is distinguishable from *Myer Holdings*. Indeed, it could be said that it does follow automatically that ASIC must establish the facts underpinning the

[2718] GCS at [142].
[2719] GCS at [142(a)].

misleading and deceptive representations were "material" to the value of GetSwift's shares in order to found a reasonable expectation of disclosure, and such an approach impermissibly elides ASIC's continuous disclosure case and its misleading and deceptive conduct case. In any event, there is no need to descend into a debate about principle, as it ultimately does not matter. That is because, like was the case in *Myer Holdings* (at [1488] per Beach J), I have found that GetSwift contravened Listing Rule 3.1 and s 674 by not making the requisite disclosures in any event.

2169 *Perpetually on Trial and Terminable at Will Contentions*: GetSwift contends that, relatedly, the market would not expect disclosure of matters already known or disclosed such as the fact that a contract could be terminated, which it says was already known and had been disclosed in the Prospectus.[2720] My discussion above in relation to the balance of the context, including GetSwift's Perpetually on Trial and Terminable at Will Contention, is sufficient to dispose of this argument: see [1117]–[1143]. As stated above, this submission elides the general risks associated with GetSwift's business model and clients terminating their agreements with the specific risks associated with a trial period: the disclosure of the former is not equivalent with the disclosure of the latter. However, even assuming that investors understood from the Prospectus, as *part* of the context, that any contract could be terminated at will, it does not follow that all classes of relevant investors could be taken to understand up to a year after the issue of the Prospectus that the parties to a specific contract released to the market as an "exclusive multi-year contract" and marked as price sensitive could have terminated it at will with no residual obligations. GetSwift's contentions proceed on the premise that investors would have understood that agreements the subject of ASX announcements could be terminated at any time, even after the successful completion of a trial period or proof of concept.

2170 *Generality Contention:* GetSwift contends that because the announcements were expressed at such a "high level of generality", it cannot be assumed that the market would have expected a high level of disclosure.[2721] GetSwift's contention is that, because the announcements were so general, the market would not expect GetSwift to disclose the information said to ground the

[2720] GCS at [142(b)].
[2721] GCS at [142(c)].

misleading or deceptive conduct, which involves "a very granular level" of detail, including the specific terms of certain agreement. This submission misses the point and, at a general level, should be rejected. *First*, the specificity of the information is not the issue; the issue is whether the information conveyed representations that were false, misleading or deceptive or likely to mislead or deceive. When an announcement is made which summarises details of an agreement at a high level of generality, the relevance of "granular" details is not lost where those details contradict or qualify the summary that is being presented: brevity does not permit inaccuracy. I do not accept that, given the announcements were expressed at a high level of generality, the market would not have reasonably expected a high level of disclosure. *Secondly*, I do not accept that the announcements were generally expressed at a very high level of generality; many included specific details. For instance, the Yum Announcement provides:

> Yum! is one of the world's largest fast food restaurant companies in terms of system units - with 42,692 restaurants (including 8,927 that are company-owned, 796 that are unconsolidated affiliates, 30,930 that are franchised, and 2,039 that are licensed) around the world in over 130 countries and growing.[2722]

2171 In any event, irrespective of whether the omitted information was "granular" for the purposes of the continuous disclosure contraventions, as I will reveal below, the omitted information significantly qualified, contradicted or corrected the unqualified ASX announcements, particularly in the light of the Agreement After Trial and Quantifiable Announcements Representations.

2172 *Familiar SaaS Business Model Contention:* GetSwift says that ASIC has not paid "sufficient regard to the characteristics of the hypothetical reasonable investor" and that the "hypothetical reasonable investor would not have read and understood GetSwift's Prospectus, notifications to the ASX, and Customer Announcements in the manner for which ASIC contends".[2723] In particular, GetSwift relies upon the fact that the market was familiar with SaaS businesses and their characteristics, given that there were at least 40 SaaS companies listed on the ASX and a number of those SaaS companies had similar business model features to GetSwift.[2724] To my mind, it is too much of a stretch to contend that this proves the market was "familiar" with SaaS businesses. In any event, any resort to a "speccy stock" mentality among GetSwift's

[2722] Yum Announcement (GSW.1001.0001.0318).
[2723] GCS at [143]–[144].
[2724] GCS at [144].

investors is an assertion that lacks any evidentiary foundation. People may take a "punt" on a class of shares which might be regarded as high risk; however, this does not mean that they expect the company would not comply with norms regulating what the entity says to the market of investors. Moreover, this assertion, made at a high level of generality, does not align with ASIC's pleaded case, which concerns specific facts and particular ASX announcements in question.

2173 *Circularity Contention*: a repeated contention that emerges in relation to each of the Enterprise Clients below concerns GetSwift's assertion that ASIC's misleading and deceptive conduct case has been advanced with "some significant and remarkable circularity", given that "ASIC relies on the same matters said to establish the representations to prove that they were misleading."[2725] Much might be said critically about the complexity and apparently superfluous nature of the misleading and deceptive conduct case, but this criticism is not well-founded. The various representations alleged by ASIC arise either expressly or by implication from a combination of the existing representations made to date (that is, the Agreement After Trial Representations and the Quantifiable Announcements Representations), the express statements made by GetSwift in the relevant ASX announcements, and GetSwift's failure to disclose certain information. In this way, the undisclosed specific information, in turn, is relied upon to establish the misleading or deceptive nature of the conduct.

2174 Having disposed of each of GetSwift's broad contentions from the outset, it is necessary to turn to make findings in respect of the general representatinos that are alleged by ASIC, before then turning to the specific representations alleged in relation to each ASX announcement.

I.3 General representations

2175 I first turn to each of the general representations which are alleged to have been made by GetSwift. As I will explain below, I accept that each of the general representations was made. It is important to note that only the final two general representations – the Second Quantifiable Announcements Representation and the Third Quantifiable Announcements Representation – are said to amount to a contravention of s 1041H of the *Corporations Act* and s 12DA of the

[2725] GCS at [434(b)]. See also GCS at [489], [804], [820], [884], and [1270].

ASIC Act. The former four representations are used as a basis upon which to ground each of the specific contraventions as to the Enterprise Clients, which I will turn to below.

I.3.1 *First Agreement After Trial Representation*

2176 The First Agreement After Trial Representation is alleged to have been made in the Prospectus: as described at [26]. Indeed, ASIC alleges that GetSwift represented to investors that:

(1) a POC (or trial phase) would be completed before GetSwift entered into an agreement with an Enterprise Client for the supply of GetSwift's services for a reward;

(2) any agreement entered into by GetSwift with Enterprise Clients for the supply of GetSwift's services were not conditional upon completion of concept or trial; and

(3) Enterprise Clients would only enter into an agreement after the proof of concept or trial phase had been successfully completed.[2726]

2177 For convenience, I have set out the key passage from the Prospectus that are relied upon to found the First Agreement After Trial Representation:

> **Enterprise clients** are larger organizations with multi-site requirements and trading volumes of greater than 10,000 deliveries per month.
>
> The sales cycle is more interactive with these clients and requires a GetSwift sales person to onboard and monitor. Typically, a 90-day POC trial is granted and the client then moves to a standard contract.[2727]

2178 As I prefaced above, this representation is an element of the other contraventions, but is not itself a contravention.

2179 GetSwift denies that it made the First Agreement After Trial Representation.[2728] *First*, it draws upon the word "typically" in the statement "[t]ypically, a 90-day POC trial is granted" and says that the hypothetical reasonable investor would not have understood that part of the Prospectus to mean that a 90-day proof of concept period would invariably be adopted across all Enterprise Clients.[2729] *Secondly*, it draws upon the words "enterprise *clients*" (emphasis added) to say that,

[2726] ACS at [40].
[2727] Prospectus (GSW.1001.0001.0478) at 0507 (emphasis in original). See also Prospectus (GSW.1001.0001.0478) at 0490.
[2728] GCS at [165]–[170].
[2729] GCS at [167].

given that an entity had to have entered into a contract with GetSwift to be an Enterprise Client, a hypothetical reasonable investor would have understood that "enterprise clients" were clients who had already entered into a contract with GetSwift, and that proof of concept trials were granted to such clients as part of the contract they had signed (as opposed to clients signing a contract *after* the proof of concept phase had been successfully completed).[2730] In support of this contention, GetSwift asserts that the word "move" in the statement "a 90-day POC trial is granted and the client then *moves* to a standard contract" (emphasis added), demonstrates that a transition took place within the existing contractual framework, as opposed to a client necessarily entering into a new and subsequent legal regime.[2731]

2180 These submissions do not withstand scrutiny. GetSwift's *first* contention is not to the point, given GetSwift does not oppose the conclusion that this statement conveyed what the usual or ordinary position was and would be, absent any qualifying or contradicting statement made by GetSwift at a later time. The position being conveyed was that in the *usual and ordinary course*, a trial would be granted for 90 days. As to its *second* contention, a cursory reading of the Prospectus as a whole reveals that GetSwift's references to an "enterprise client" or "client" are a reference to the class of entities that GetSwift had secured as clients, but also to those entities that GetSwift was wishing to secure as clients. GetSwift's reliance on the word "move" is of no assistance to it. Rather, it is evident that a hypothetical reasonable investor would understand the words "and the client *then moves* to a standard contract" (emphasis added) to mean that the client would then enter into a standard contract. The adverb "then", which is read together with the word "moves", puts GetSwift's erroneous interpretation of the text to rest. Even if there was any doubt, the statement in the Prospectus that "GetSwift's [E]nterprise [C]lients who have entered into POC have a 100% sign up rate to contracts as at the date of the Prospectus"[2732] confirms that GetSwift itself draws a distinction between a *proof of concept trial* and a subsequent *contract*.[2733] To this end, the hypothetical reasonable investor would understand a reference to "Enterprise Client" to include a prospective client that was waiting

[2730] GCS at [168].
[2731] GCS at [169].
[2732] Prospectus (GSW.1001.0001.0478) at 0507.
[2733] ASIC Reply at [130].

for the successful completion of a "proof of concept trial" before entering into a concluded agreement to utilise the GetSwift platform.

2181 For these reasons, I am satisfied that GetSwift made the First Agreement After Trial Representation. Each of Mr Hunter, Mr Macdonald and Mr Eagle approved the Prospectus (see [1901]), meaning I am satisfied they were each aware of the First Agreement After Trial Representation.

I.3.2 *First Quantifiable Announcements Representation*

2182 The First Quantifiable Announcements Representation is alleged to have been made in GetSwift's April Appendix 4C: as described at [31].

2183 For convenience, I have set out the relevant passage of the April Appendix 4C in full below:

> **New clients signed on, geographic reach expanding**
>
> Additionally on top of CBA, GetSwift was pleased to sign a number of additional clients during [*sic*] quarter such as Lone Star Texas Grill, Crosstown Doughnuts, and Mobi2Go as well as many more during the quarter.
>
> Under the exclusive multi year contract with CBA the company in 2017 will focus in making available and expanding the GetSwift platform across more than an estimated 50,000 merchants in the joint networks. The strategy should secure the company's and CBAs [*sic*] leadership in the sector across all of Australia in phase 1 of the company's roadmap. The two organisations will be collaborating on a number of initiatives, across a number of devices and partners.
>
> Furthermore the company is starting to begin harvesting the markets it has prepared the groundwork over the last 18 months. **Transformative and game changing partnerships are expected and will be announced only when they are secure, quantifiable and measurable. The company will not report on MOUs only on executed contracts. Even though this may represent a challenge for some clients that may wish in [some] cases not [*sic*] publicize the awarded contract, fundamentally the company will stand behind this policy of quantifiable non hype driven announcements even if it results in negative short term perceptions.**[2734]

2184 This alleged representation, like the First Agreement After Trial Representation, is relevant to the other contraventions but not itself a contravention.

2185 GetSwift denies that it made the First Quantifiable Announcements Representation.[2735] Its primary contention is that the hypothetical reasonable investor would not have understood

[2734] April 2017 Appendix 4C (GSW.1001.0001.0459) at 0461–0462 (emphasis altered).
[2735] GCS at [148]–[154].

GetSwift to be representing that it would only announce contracts when the *financial benefits* to GetSwift were secure, quantifiable and measurable. Rather, it is said that GetSwift was communicating that "partnerships" would only be announced when they were the subject of legally binding agreements which defined the parties' rights and obligations, at which point, it could "fairly be said that the partnership was secure, quantifiable and measurable in the sense that both parties were contractually bound and had quantifiable and measurable rights and obligations."[2736] GetSwift contends that such an interpretation is consistent with the plain language of the April Appendix 4C, which stated that GetSwift would "not report on MOUs, only on executed contracts" – the use of the word "executed", and the distinction drawn between executed contracts and non-binding MOUs, is said to support GetSwift's view as to how the hypothetical reasonable investor would have understood the April Appendix 4C.[2737]

2186 This submission should be rejected. It is readily apparent that GetSwift was conveying to the hypothetical reasonable investor that it was *expecting* to announce new contracts when they were executed. However, the words "only when they are secure, quantifiable and measurable" are not delimited by the words "executed contracts". Contrary to GetSwift's submissions, I do not regard the hypothetical reasonable investor to read the words "secure, quantifiable and measurable" as meaning the execution of the relevant contract (particularly when read together with the notion of GetSwift "harvesting" the markets for which it had laid the groundwork). Such a construction does not accord with the natural and ordinary meaning of the words and the dominant message that would be conveyed to the hypothetical reasonable investor when that passage is read in context.

2187 There are three reasons that fortify this conclusion. *First*, the execution of a contract, or the act of it, is not something that is quantifiable or measurable. Instead, it is the benefits under the contract that become quantifiable and measurable upon the securing of the contract by reason of its execution. *Secondly*, the notion of "harvesting" conveys the reaping of a benefit: a proposition grounded by reference to the second paragraph above, which extolls the benefits that had been allegedly "secured" under the CBA contract. *Thirdly*, the statement that GetSwift "will stand behind [its] policy of quantifiable non hype driven announcements", even when

[2736] GCS at [151].
[2737] GCS at [152].

challenged by "clients that may wish in [some] cases not [*sic*] publicize the awarded contract", is notable. It seems to me that this statement, in substance, reiterates that GetSwift will only announce a contract when its benefits are "quantifiable" even if it results in negative short-term perceptions and even though a client may wish to publicise an "awarded contract" that had not reached the point of being "quantifiable".

2188 From this analysis, it is apparent the dominant message was that partnerships, contracts or agreements would only be announced when the benefits of the partnership, contract or agreement had reached the point of being "secure, quantifiable and measurable", and not before.

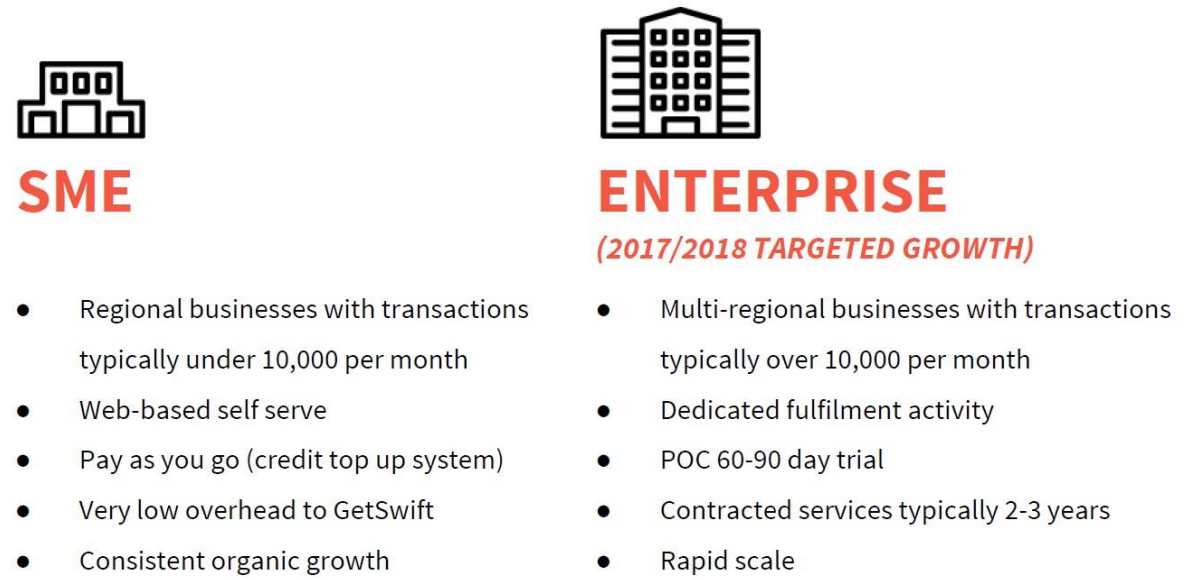
2189 On 23 April 2017, Mr Macdonald sent an email to Mr Eagle, Ms Gordon and Mr Hunter attaching a draft copy of the April Appendix 4C.[2738] On 28 April 2017, Mr Macdonald sent an email to both Mr Macdonald and Mr Eagle attaching a copy for release.[2739] Mr Hunter, Mr Macdonald, Mr Eagle and Ms Gordon received confirmation from the ASX (forwarded to them by Mr Mison) on 28 April 2017.[2740] I am therefore satisfied that each of the directors was aware of the First Quantifiable Announcements Representation.

I.3.3 *Second Agreement After Trial Representation*

2190 The Second Agreement After Trial Representation is alleged to have been made in an investor presentation on 9 May 2017: see [27].

2191 The relevant statements upon which ASIC relies are two bullet points on a slide titled "Client Segmentation", under the heading "Enterprise".[2741] The first bullet point stated: "POC 60-90 day trial". The second bullet point stated: "Contracted services typically 2-3 years". The slide is extracted below:

[2738] GSWASIC00022133 attaching GSWASIC00022134.
[2739] GSWASIC00031191 attaching GSWASIC00021486.
[2740] GSWASIC00021451 attaching GSWASIC00021452.
[2741] GSW.1001.0001.0562 at 0576.



2192 This alleged representation is again relevant to the other contraventions as an important matter of context, but is not itself a contravention.

2193 GetSwift's primary contentions as to why it did not make this representation that the relevant statements relied upon by ASIC were short and contained in bullet points; that is, they grew out of a "barren textual landscape".[2742] Indeed, it is said that there is no basis to conclude the hypothetical reasonable investor would have assumed that the "[c]ontracted services" (or alternatively the contract under which such "services" were provided) did not include the "POC 60-90 day trial".[2743] Moreover, to the extent that ASIC contends that the Second Agreement After Trial Representation arose in part from the First Agreement After Trial Representation, GetSwift contends that this position is untenable because of its previous submissions which I set out above: at [2179].[2744]

2194 I disagree. Notwithstanding that the statements may have been short and contained in bullet points (which is not to the point in any case), I accept that to the hypothetical reasonable investor, such statements would have reinforced the First Agreement After Trial

[2742] GCS at [172].
[2743] GCS at [172].
[2744] GCS at [172].

Representation, namely that once a contract was announced, it was for a period of two to three years and a proof of concept had already been completed. To the extent it is argued that this representation cannot arise because of GetSwift's contentions as to the First Agreement After Trial Representation, that argument cannot be sustained, given my findings as to its existence above: at [2180].

2195 Mr Hunter and Mr Macdonald reviewed and approved a draft of the May Investor Presentation on 8 May 2017, before Mr Macdonald instructed Mr Mison to release it to the ASX.[2745] On 9 May 2017, Mr Mison sent an email to Mr Hunter, Mr Macdonald, Mr Eagle and Ms Gordon attaching the presentation and forwarding an email from ASX confirming its release.[2746] As such, I am satisfied that each of the directors was aware of the Second Agreement After Trial Representation.

I.3.4 *Second Quantifiable Announcements Representation*

2196 The Second Quantifiable Announcements Representation is alleged to have been made in GetSwift's October Appendix 4C: as described at [32]. In the context of the (earlier) First Quantifiable Announcements Representation, ASIC contends that the Second Quantifiable Announcements Representation conveyed to the public and investors that GetSwift had, to date, only announced agreements where the financial benefit to GetSwift was secure, quantifiable and measureable, and that GetSwift would only announce agreements where such circumstances existed.

2197 For convenience, I have set out the relevant passage below from the October Appendix 4C:

> **Corporate and Financial Update**
>
> …
>
> **Outlook**
>
> The Management team is extremely pleased with the rapid growth experienced since the Company publicly listed on the ASX on 9 December 2016. The September quarter saw a significant quarter on quarter increase in **platform transaction volumes and revenue**. A strong pipeline of clients that signed up to use GetSwift continues to progress through the on-boarding process, and is expected to **directly drive transaction volumes and revenue** as GetSwift technology becomes fully integrated

[2745] GSWASIC00020147; GSWASIC00020106 attaching GSWASIC00020109.
[2746] GSWASIC00020073 attaching GSWASIC00020074.

> and deployed.
>
> The Company expects to name additional key enterprise agreements shortly as soon as the legal frameworks have been cleared. New commercially signed multiyear enterprise agreement announcements are expected to continue unabated for a number of quarters.
>
> **Please Note: The Company will only report executed commercial agreements. Unlike some other groups it will not publicly report on Memorandum of Understandings (MOU) or Letters of Intent (LOI), which are not commercially binding and do not have a valid assurance of future commercial outcomes.**[2747]

2198 GetSwift denies that it made the Second Quantifiable Announcements Representation for parallel reasons as to the First Quantifiable Announcements Representation. Indeed, GetSwift submits that this provides "even stronger support for GetSwift's position."[2748] It says that the hypothetical reasonable investor would have understood from this announcement the "message" that "partnerships" would only be announced when they were "subject to legally binding agreements which defined the parties' rights and obligations" and that this position is "fortified" by the words "as soon as the legal frameworks have been cleared".[2749]

2199 I do not accept this submission. GetSwift ignores the conjunctive in the final sentence and the words "a valid assurance of future commercial outcomes". Upon GetSwift's interpretation, a valid assurance of future commercial outcomes would include circumstance where the parties had executed an agreement, but nevertheless had no valid assurances of future commercial benefits under said agreement. I reject this forced interpretation. I accept that the words "future commercial outcomes" bear their ordinary meaning and would have conveyed those benefits to be derived under the executed contracts (as opposed to simply the execution of a contract itself) – that is what the hypothetical reasonable investor would have understood "future commercial benefits" to mean. The word "future" was clearly conveying something to occur under and pursuant to the contract and not merely the execution of the contract.

2200 Between 23 October 2017 and 28 October 2017, Mr Hunter and Mr Macdonald reviewed, and amended, several drafts of the October Appendix 4C.[2750] On 25 October 2017, Mr Eagle sent

[2747] October 2017 Appendix 4C and Third NAW Announcement (GSW.1001.0001.0277) at 0279.
[2748] GCS at [176].
[2749] GCS at [156]–[157].
[2750] GSWASIC00006253 attaching GSWASIC00006256; GSWASIC00067267 attaching GSWASIC00067268.

an email setting out his comments on a draft of the October Appendix 4C.[2751] On 29 October 2017, Mr Ozovek sent an email to Mr Eagle, Mr Hunter and Mr Macdonald with the subject "4C – Final Review Before Lodging" and attaching a draft.[2752] On 31 October 2017, they each received confirmation from Mr Banson that the quarterly report and Appendix 4C had been released to the ASX.[2753] From this evidence, I am satisfied that each had involvement in, and was aware of, the Second Quantifiable Announcements Representation.

Was the representation misleading or deceptive?

2201 ASIC alleges that by making the Second Quantifiable Announcements Representation, GetSwift, Mr Hunter and Mr Macdonald made continuing representations as to the present state of affairs that existed at 31 October 2017 and as to future matters, thereby amounting to a contravention. GetSwift simply contends that, because none of the customer-specific quantifiable benefit representations (addressed below) were misleading, the Second Quantifiable Announcements Representation was not misleading. For the two reasons below, I accept that this representation was misleading or deceptive, or likely to mislead or deceive.

2202 *First*, contrary to that which was conveyed by the Second Quantifiable Announcements Representation, it was not the true position that GetSwift had only announced agreements by that time that were secure, quantifiable and measureable. The true position as at 31 October 2017 was that in respect of a number of the ASX announcements – namely, Pizza Hut Announcement, the APT Announcement, the CITO Announcement, the Hungry Harvest Announcement, the Fantastic Furniture & Betta Homes Announcement, the Bareburger Announcement, the First NAW Announcement, the Second NAW Announcement and the Johnny Rockets Announcement – each was not secure, quantifiable and measureable (as I will detail below). As such, the true position was contrary to the position advanced in the Second Quantifiable Announcements Representation.

2203 *Secondly*, GetSwift had no reasonable grounds for conveying that it would only announce agreements in the future where the benefit to GetSwift of the agreement was secure,

[2751] GSWASIC00067282; GSWASIC00006239.
[2752] GSWASIC00005655; GSWASIC00005661.
[2753] GSW.0031.0002.3221.

quantifiable and measureable. That is because, by 31 October 2017, of the nine announcements that GetSwift had released, it had not made an announcement where the financial benefit of the relevant agreement was in fact secure, quantifiable and measureable.

2204 Finally, I should note that I do not accept Mr Hunter's contentions that the announcement was approved by the Board acting as a whole, as opposed to by Mr Hunter personally, for the reasons given above (at Part I.1.3).[2754]

2205 Since the Second Quantifiable Announcements Representation was not qualified, withdrawn or corrected, GetSwift, and Mr Hunter and Mr Macdonald personally, engaged in misleading or deceptive conduct, or conduct that was likely to mislead or deceive investors and potential investors by making the Second Quantifiable Announcements Representation. I am satisfied that the conduct contravened s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

I.3.5 *Third Quantifiable Announcements Representation*

2206 The Third Quantifiable Announcements Representation is alleged to have been made in the Key Partnerships Announcement dated 14 November 2017: as described at [33].[2755]

2207 This representation is said to have arisen from GetSwift's failure to qualify, withdraw or correct the First and Second Quantifiable Announcements Representations, together with the following statement made in the Key Partnerships Announcement titled "GetSwift Executes on Key Integration Partnerships", which ASIC said conveyed that GetSwift would only announce an agreement if the associated financial benefit to GetSwift was secure, quantifiable and measureable:

> The Company is taking a measured approach in ensuring that only quantifiable and impactful announcements are delivered to the market. With that in mind it has chosen to announce 9 of these integrations once they all have been completed rather than individually.[2756]

2208 GetSwift's contentions repeat, in substance, its arguments in relation to the First Quantifiable Announcements Representation, simply stating that the "November announcement provides no textual basis for the making of the alleged Representation".[2757] For similar reasons to those I

[2754] HCS at [284].
[2755] Key Partnerships Announcement (GSW.1001.0001.0286).
[2756] Key Partnerships Announcement (GSW.1001.0001.0286) at 0287.
[2757] GCS at [159]–[160].

have expressed above (see [2186]–[2188]), I reject GetSwift's contentions that the Third Quantifiable Announcements Representation was not made out. As with the First Quantifiable Announcements Representation, GetSwift's contentions suffer from the vice that they seek to read the words "quantifiable" as being referable to the execution of the contract itself. The words here do not even refer to a contract. Rather, they refer to "quantifiable and impactful announcements", which would convey to, and be read by, the hypothetical reasonable investor as meaning that, as part of GetSwift's "measured approach", any announcements that GetSwift made would be in relation to contracts where the benefits were quantifiable, particularly when considered together with GetSwift marking the announcements as price sensitive. I am satisfied that ASIC has proved that the Third Quantifiable Announcements Representation was made.

2209 On 13 November 2017, Mr Hunter and Mr Macdonald reviewed and circulated drafts of the Key Partnerships Announcement and Mr Hunter stated in an email to Mr Macdonald "Get copy to Brett, Jamila and Zane. Should be price sensitive".[2758] The same day, Mr Macdonald sent an email to Ms Gordon, Mr Hunter and Mr Eagle stating: "Please find attached to go out in next 30 mins to ASX. Any issues please let me know before 920am".[2759] Mr Eagle responded: "Good my side".[2760] Mr Macdonald then sent an email to Mr Banson, copied to Mr Hunter and Mr Eagle, attaching the Key Partnerships Announcement in which he stated, "Zane, Please submit this to ASX, tagged as price sensitive and following normal protocol with their market announcements team like we did last time".[2761] This evidence suggests that each of the directors was aware of the Third Quantifiable Announcements Representation.

Was the representation misleading or deceptive?

2210 ASIC alleges that by making the Third Quantifiable Announcements Representation, GetSwift, and Mr Hunter and Mr Macdonald personally, made continuing representations as to the present state of affairs that existed as at 31 October 2017, and as to future matters. It says that in the context of the (earlier) First Quantifiable Announcements Representation that had been made on 28 April 2017 and the Second Quantifiable Announcements Representation that had been made on 31 October 2017, the Third Quantifiable Announcements Representation

[2758] GSWASIC00004405 attaching GSWASIC000044061.
[2759] GSWASIC00004401 attaching GSWASIC00004402.
[2760] SWI00023207.
[2761] GSWASIC00004397 attaching GSWASIC00004398.

conveyed to members of the public and investors, that GetSwift had, to date, only announced agreements where the financial benefit to GetSwift was secure, quantifiable and measurable and that GetSwift would only announce an agreement in the future when the associated financial benefit to GetSwift was secure, quantifiable and measurable.

2211 For the same reasons as I set out in respect of the Second Quantifiable Announcements Representation (see [2201]–[2205]), I accept that the Third Quantifiable Announcements Representation was misleading or deceptive, or likely to mislead or deceive. It conveyed to members of the public and investors a position that was contrary to reality.

2212 As such, by their conduct in making the Third Quantifiable Announcements Representation and in authorising them to be made, I am asatisfied that GetSwift, and Mr Hunter and Mr Macdonald personally, engaged in conduct that contravened s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

I.4 Specific representations

2213 In this section, I make findings in respect of the specific representations that ASIC alleges GetSwift, Mr Hunter and Mr Macdonald made in relation to each Enterprise Client.

I.4.1 *GetSwift's threshold contentions*

2214 It is important to note that I largely accept ASIC's submissions concerning each of the alleged specific representations. GetSwift's submissions primarily draw upon a number of specific threshold points, which are repeated formulaically (although in relation to different Enterprise Clients) throughout its submissions. To save time and space, it is convenient to deal with these contentions at a general level here and only address them when they raise an idiosyncratic issue in respect of one of the alleged contraventions.

2215 *First*, GetSwift contends that the brevity and simplicity of many of the announcements tells against the making of the very specific representations alleged.[2762] *Secondly*, it is said that the representations in the First and Second Agreement After Trial Representations were not made, and therefore no contravention which draws upon these representations can be made out.[2763]

[2762] See GCS at [326], [573], [806], [886], [924], [1065], [1271], and [1281].
[2763] See GCS at [326], [498], [806], [814], [886], [894], and [1272].

Thirdly, GetSwift submits that because the omitted information was "not material", there could have been no reasonable expectation it should have been disclosed.[2764]

2216 Each of these threshold points should be rejected.

2217 *First*, it is not to the point that the announcements were simple, particularly since, for the most part, they disclosed the fact that GetSwift had entered into a substantial and "exclusive" contract that was conditional on a successful trial. My reasons at [2170] are also relevant in this regard. *Secondly*, as I have made clear, I consider that each of the First and Second Agreement After Trial Representations was made: see [2176]–[2181], [2190]–[2195]. *Thirdly*, although it is arguable that the materiality of the omitted information is not to the point, for the reasons I expressed above (at [2167]), in any event, this is of no moment as I have found the omitted information was material in Part H.3.

2218 Two further points can be dealt with at the outset.

2219 *First*, in its response to the specific contraventions below involving each of the Quantifiable Benefit Representations in regards to Pizza Pan, CITO, Hungry Harvest, Fantastic Furniture, Betta Homes, Bareburger, NA Williams, Johnny Rockets and Yum, GetSwift's primary defence is that the Quantifiable Announcement Representations were not made and therefore the Enterprise Client-specific Quantifiable Benefit Representations were not made.[2765] A related defence is that for those ASX announcements that did not include any specific reference to a financial benefit, the hypothetical reasonable investor would not have interpreted the announcement as making any representation to the effect that some unstated benefits were "secure, quantifiable and measurable".[2766]

2220 As I have made clear, I consider that each of the Quantifiable Announcement Representations was made in accordance with my findings above: see [2182]–[2189], [2196]–[2205], [2206]–[2212] respectively. Further, the subsidiary defence must also fail. The link in ASIC's case between the ASX announcements and the omitted information is that the omitted information was important contextual and qualifying information, which would, *inter alia*, indicate to an

[2764] See GCS at [326], [492(e)], [886], and [1272].
[2765] See GCS at [498], [814]–[815], [894]–[895], and [1282]–[1283].
[2766] See GCS at [706], [751], [813], [893], [932], and [1080].

investor that the realisation of the benefits stated in those announcements (expressly or by necessary implication arising from entry into a contract with a significant counterparty consistent with the expectations engendered among investors) was less certain and, in the case of the Termination Information and No Financial Benefit Information, that there was no prospect of the stated projections or financial benefits being achieved. In other words, the ASX announcements made after each of the respective Quantifiable Announcement Representations would be interpreted by the hypothetical reasonable investor with the knowledge of the content of those representations; it does not matter whether a dollar figure is stated in the announcement.

2221 *Secondly*, it appears that GetSwift's fallback defence to each of the Quantifiable Benefit Representations (other than with respect to Amazon) is that if the representations were made, then the benefits were secure because there was a legally binding agreement. GetSwift also contends that there could be "no doubt" that it was possible to quantify and measure the benefit based on the terms of the agreement, including as to price, by making reasonable assumptions as to how much the Enterprise Client would use the GetSwift platform.[2767] That defence has no substance, given the combination of the following: (a) the pay-per-use terms and various termination rights (including those that applied prior to the expiry of the trial periods) in the respective client agreements; (b) the extent to which the Enterprise Clients were only conducting trials of the GetSwift platform at the time of the making of the Quantifiable Benefit Representations; and (c) in the absence of any commitment to any paid use of the GetSwift platform or minimum use provisions, it was objectively not possible to quantify or measure the potential benefits available from the contracts. As ASIC submits, there has been no attempt by GetSwift to quantify or measure these benefits, despite the contention that there was "no doubt" that this could be done.[2768]

I.4.2 *Messrs Hunter and Macdonald*

2222 I have already detailed above (at Part I.1.3) the reasons that I do not accept that, in making the Announcements, Mr Hunter and Mr Macdonald were merely acting as part of the corporate

[2767] See GCS at [500], [588], [709], [752], [816], [896], [933], [1018], [1081], and [1212].
[2768] ASIC Reply at [144].

organ of GetSwift and both of them must be found to be personally liable for each of the Agreement, Price Sensitivity and Quantifiable Benefit Representations. In this respect, I do not think there is a need to repeat their contentions *seriatim*.[2769] The standard practice was that Mr Macdonald, alongside Mr Hunter, dictated what was released in the ASX announcements and when: see [1809]–[1894]. The evidence establishes they mostly worked hand in glove. While Mr Hunter had primary carriage of the drafting of the ASX announcements, when one gives consideration to the weight of the evidence, I have no doubt Mr Macdonald would have been well aware of what Mr Hunter was doing (and what he was not doing) when it came to announcements. They were both the directing mind of GetSwift in this respect.

2223 The position with respect to the Financial Benefit Representations and the Termination Representations is different. ASIC has not particularised any conduct or omission on Mr Macdonald's part after the release of a particular announcement beyond a general allegation that Mr Macdonald failed to cause GetSwift to disclose further information or withdraw the announcement.[2770] Indeed, in respect of both Messrs Hunter and Macdonald, reliance is again placed largely on their alleged conduct in "contributing to the drafting, approving, authorising and directing the transmission to the ASX" of the impugned announcements, *not* any subsequent conduct. This causes some difficulties. While with respect to the Agreement Representations, the Price Sensitivity Representations and Quantifiable Benefit Representations, the representations derive from a positive act on the part of Messrs Hunter and Macdonald (that is, the authorisation and release of the relevant ASX announcement), the Financial Benefit Representations and the Termination Representations are said to have been made passively. ASIC points to no specific *conduct* on the part of Messrs Hunter and Macdonald which it seeks to impugn except at the very highest level of generality. I am not satisfied that Messrs Hunter and Macdonald should be found to have personally made the impugned representations. This conduct is accurately characterised as that of the corporate organ of GetSwift and not of the individuals.

2224 With these additional general comments in mind, it is necessary to begin the tedious task of making findings in respect of each contravention alleged as to each of the Enterprise Clients.

[2769] Although they are repeated relentlessly: see, e.g., HCS at [85]–[86], [110]–[111], [127]–[128], [139]–[141], [157], [174]–[175], [189], [217]–[220], [237], [254], [271], and [282].
[2770] MCS at [58].

There is much repetition in what follows (but this is a function of the unnecessarily complex way that ASIC ran its case); it is important to demonstrate that all relevant matters have been considered in the context of each group of contraventions. Further, I should note again that when, for convenience, I refer to submissions being made by GetSwift, this is shorthand (in that in relevant respects these submissions were adopted by Messrs Hunter and Macdonald).

I.4.3 *Fruit Box*

2225 ASIC alleges that the following continuing representations were made in respect of Fruit Box: (1) the Fruit Box Agreement Representations; and (2) the Fruit Box No Termination Representation.

Fruit Box Agreement Representations

2226 By making the Fruit Box Announcement, by failing to qualify, withdraw or correct the Fruit Box Announcement following its release, by making the First Agreement After Trial Representation and by not disclosing the Fruit Box Agreement Information or the Fruit Box Projection Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 24 February 2017 until 25 January 2018:

(a) any trial period with Fruit Box had been successfully completed;

(b) the Fruit Box Agreement was unconditional;

(c) Fruit Box had entered into an agreement with GetSwift which:

(i) Fruit Box could not terminate for convenience; and

(ii) further or alternatively, required Fruit Box to use GetSwift exclusively for its last-mile delivery services for a period of three years; and

(d) it had reasonable grounds for making the Fruit Box Projection

(collectively, the **Fruit Box Agreement Representations**).

Do the representations arise?

2227 There is no need for me to repeat what I have said above concerning GetSwift's threshold points, which repeat its general contentions relating to the Agreement After Trial Representations, its materiality contentions, and its argument that the Fruit Box Announcement

was brief and simple.[2771] GetSwift's only other threshold points of contention are that ASIC has failed to establish that the Fruit Box Agreement Representations were made because: (1) the First Agreement After Trial Representation was not made; (2) the Fruit Box Agreement Information had, in substance, been disclosed; and (3) the Fruit Box Projection Information has not been established.[2772] These contentions do not take the matter further, given that I am satisfied that the First Agreement After Trial Representation was made (see [2176]–[2181]), the Fruit Box Agreement Information was not generally available (see [1280]–[1282]) and the Fruit Box Projection Information existed: see [1293]–[1301].

2228 As to whether the representations were made, it is necessary to consider each of GetSwift's specific arguments:

(1) As to *representation (a)*, GetSwift contends that because there was no express representation as to the trial period, whether any such representation was conveyed must depend on whether the hypothetical reasonable investor would have expected that any trial period with Fruit Box had not been completed to be disclosed. It says that because the market knew GetSwift was perpetually on trial and the Fruit Box Agreement was not material, there is no sufficient basis to conclude that a reasonable hypothetical investor would have expected the matter to be disclosed.[2773]

(2) As to *representation (b)*, GetSwift grapples with the meaning of "unconditional", asserting that if the representation meant the agreement contained no conditions, it would not have been conveyed to the hypothetical reasonable investor because commercial agreements inevitably contain various conditions.[2774]

(3) As to *representation (c)*, GetSwift contends that because the Prospectus stated that customers could terminate at will or utilised a pay-per-use model, a hypothetical reasonable investor would not have understood the Fruit Box Announcement to be contradicting the Prospectus.[2775]

[2771] GCS at [326].
[2772] GCS at [333].
[2773] GCS at [327(a)].
[2774] GCS at [327(b)].
[2775] GCS at [327(c)].

(4) As to *representation (d)*, GetSwift contends that ASIC bears the onus of proving a lack of reasonable grounds for this statement to be misleading, and that this requires it to prove, at least, the alleged Fruit Box Projection Information, which it says it has failed to do.[2776]

2229 Each of these submissions should be rejected.

2230 GetSwift's *first* contention cannot succeed for two reasons. *First*, focussing upon the *materiality* of the Fruit Box Agreement is misconceived in circumstances where the representation here does not arise from silence alone: see [2167]–[2168]. *Secondly*, even if I am wrong about this point, I am satisfied that the hypothetical reasonable investor would have expected disclosure given I have found that the Fruit Box Agreement Information was material within the meaning of s 674 of the *Corporations Act*: see [1283]–[1291]. Briefly, even if the market knew that GetSwift was perpetually on trial, which I do not accept (see [1117]–[1143]), this must be read in the context of the First Agreement After Trial Representation, which expressly conveyed that the announced contracts had been entered into *after* a proof of concept or trial had been successfully concluded. It seems to me that what was expressly conveyed to the hypothetical investor was that a trial period with Fruit Box had been successfully completed.

2231 GetSwift's *second* contention, to my mind, fails to address the point being made by ASIC, which is tolerably clear. It is obvious that parties do not enter into a legal relationship in a vacuum and there are always terms that guide how a bargain struck is to operate. This representation is not as to this basal fact, but rather the assertion that the Fruit Box Agreement, as the terms of that agreement were represented in the Fruit Box Announcement, was unconditional; that is, there were no substantive qualifications to the main terms of the Agreement. I am satisfied that the Fruit Box Announcement did not disclose important qualifying information, which resulted in a representation arising that the Fruit Box Agreement was unconditional.

2232 GetSwift's *third* submission also does not withstand scrutiny. I have already disposed of GetSwift's Perpetually on Trial and Terminable at Will Contention above: see [1117]–[1143].

[2776] GCS at [327(d)].

In any event, by expressly stating that Fruit Box had signed "a three-year exclusive contract" in the Fruit Box Announcement, a hypothetical reasonable investor would have understood that this was a contract which Fruit Box could not terminate for convenience because it was locked into an exclusive three-year contract.

2233 GetSwift's *fourth* submission proceeds on a false premise, given my findings above that ASIC proved the Fruit Box Projection Information existed in its entirety: see [1301].

2234 Having disposed of each of GetSwift's specific contentions, I am satisfied that the representations (a)–(c) arise by reason of the First Agreement After Trial Representation (by which GetSwift represented that agreements were announced *after* the successful completion of a proof of concept or trial), and the express statement in the Fruit Box Announcement which stated that GetSwift had signed "a three-year exclusive contract" with Fruit Box. The Fruit Box Announcement did not contain qualifications, nor did it disclose that the three-year term and the exclusivity provisions of the Fruit Box Agreement were conditional on the expiry of the trial period. Taken together with the First Agreement After Trial Representation, I am satisfied the Fruit Box Announcement, and the statements contained therein, all conveyed to the ordinary investor that any trial period with Fruit Box had been successfully completed and that the Fruit Box Agreement was unconditional, with exclusivity for a period of three years.

2235 Moreover, I am satisfied that representation (d) arises by reason of the specificity of the Fruit Box Projection which is referred to in the Fruit Box Announcement, including: "Fruit Box Group currently [undertakes more than 1,500,000 deliveries per year] … with significant growth projections in place"; GetSwift had signed "an exclusive three year contract to optimise and manage their fruit, milk and goods delivery operations nationally"; and GetSwift "are delighted and thankful to be in a position to be their exclusive partner over the next three years of their projected rapid growth". Further, by reason of GetSwift having made these statements in an announcement to the ASX, an ordinary investor would have understood the Fruit Box Announcement as conveying that GetSwift had reasonable grounds for making the Fruit Box Projection.

2236 GetSwift was obliged to qualify, withdraw or correct the Fruit Box Announcement because the Fruit Box Agreement Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the Fruit Box Agreement Information was materially different from, and inconsistent with, the statements made by GetSwift in the Fruit Box Announcement; and (ii)

the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2237 As to whether the Fruit Box Agreement Representations were misleading or deceptive, or likely to mislead or deceive, GetSwift advances the following submissions:

(1) As to *representation (b),* if made, any representation about the Fruit Box Agreement being unconditional would not have been misleading because it would be incorrect to describe the completion of the limited rollout period as being a pre-condition to the Fruit Box Agreement coming into effect. It says that the agreement took effect at the time it was made and was not subject to any pre-conditions; Fruit Box merely had a right that it could exercise to bring the Fruit Box Agreement to end during the limited rollout period.[2777]

(2) As to *representation (c),* if made, it could not have been misleading because the Fruit Box Agreement was actually for a term of three years.[2778]

2238 The problem with GetSwift's *first* contention is that it fails to address the fact that a condition precedent to the substantive term of the Fruit Box Agreement becoming operative was the successful completion of a trial, subject to an early right of termination.[2779] The failure to disclose this fact rendered any representation that the Fruit Box Agreement was "unconditional" misleading or deceptive. Further, GetSwift's *second* contention again fails to acknowledge the reality that at the time of the Fruit Box Announcement (which is when the representation arises), there was a possibility of Fruit Box terminating. This would result in the three-year term not eventuating. To my mind, any statement that Fruit Box had to use GetSwift exclusively for a term of three years was also misleading or deceptive.

2239 I am therefore satisfied that the Fruit Box Agreement Representations were misleading or deceptive, or likely to mislead or deceive, by reason of the First Agreement After Trial Representation (namely that a proof of concept or trial had been completed before the Fruit

[2777] GCS at [327(b)].
[2778] GCS at [327(c)].
[2779] ASIC Reply at [214].

Box Agreement was entered into and announced) and by reason of the Fruit Box Agreement Information. The Fruit Box Announcement was published when the parties were still within the "limited roll out" (or trial period) and where Fruit Box had a contractual right to terminate. At the time of the announcement, GetSwift, Mr Hunter and Mr Macdonald knew that if Fruit Box exercised its contractual right to terminate within the limited roll out period (which it ultimately did), this would have prevented the announced three-year term from commencing and removed any obligation on Fruit Box to use the GetSwift Platform exclusively. These circumstances directly contradict statements that GetSwift had signed an exclusive three-year term. Finally, I am satisfied that the nature of the omitted Fruit Box Agreement Information (which permitted Fruit Box to terminate during the trial period) and the Fruit Box Projection Information (which establishes that GetSwift had assumed a significant growth rate of approximately 24% *without* receiving any historic or projected growth rate information from Fruit Box) meant that GetSwift did not have reasonable grounds for making the Fruit Box Projection in the Fruit Box Announcement.

Fruit Box No Termination Representations

2240 By making the Fruit Box Announcement, by failing to qualify, withdraw or correct the Fruit Box Announcement following its release, and by not disclosing the Fruit Box Termination Information until 25 January 2018, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations:

(a) the Fruit Box Agreement had not been terminated;

(b) GetSwift continued to have an agreement with Fruit Box which required Fruit Box to use GetSwift exclusively for its last-mile delivery services for a period of three years;

(c) the following statements in the Fruit Box Announcement continued to be true:

  (i) GetSwift had signed a three-year exclusive contract with Fruit Box;

  (ii) Fruit Box currently manages over 1,500,000+ deliveries every year with significant growth projections in place; and

  (iii) the exclusive contract with Fruit Box was projected at more than 7,000,000+ total aggregate deliveries

(collectively, the **Fruit Box No Termination Representations**).

2241 GetSwift argues that the Fruit Box No Termination Representations arise by silence. As such, it says that ASIC's case depends on a hypothetical reasonable investor having a reasonable expectation that any termination of the Fruit Box Agreement needed to be disclosed, and concludes that any investor would not, because the Fruit Box Agreement was not material.[2780]

2242 For reasons that I have already provided in addressing GetSwift's Mere Silence Contention (see [2167]–[2168]), I do not think this argument takes the matter further, particularly in the circumstances where the representations in the present case do not arise by mere silence but by the making of the Fruit Box Announcement. But I am also satisfied GetSwift had an obligation to disclose the Fruit Box Termination Information given it was material under s 674 of the *Corporations* Act: see [1312]–[1314]. This fortifies me in the view that the hypothetical reasonable investor would have had a reasonable expectation of disclosure.

2243 I am satisfied that the Fruit Box No Termination Representations were made and were each misleading or deceptive. However, while the Fruit Box Termination Information, including Mr Halphen's email (see [191]), was known to each of GetSwift, Mr Hunter and Mr Macdonald (see [195]), I am not satisfied that these representations were made personally. That is because there was no positive act on the part of each director, and while I accept Mr Macdonald took responsibility for "owning the retraction", the duty to disclose belonged to all directors. The representation is therefore more aptly characterised as deriving from the corporate organ of GetSwift.

Fruit Box Conclusions

2244 By failing to disclose the Fruit Box Agreement Information, by making the First Agreement After Trial Representation and by contributing to the drafting, approving, authorising and/or directing to the ASX of the Fruit Box Announcement, GetSwift and each of Mr Hunter and Mr Macdonald personally made the Fruit Box Agreement Representations. Further, by failing to disclose the Fruit Box Termination Information, GetSwift made the Fruit Box No Termination Representations. As a result, I am satisfied that each of them engaged in conduct that was misleading or deceptive, or likely to mislead or deceive investors and potential investors, thereby contravening s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* (although

[2780] GCS at [336].

I do not find Messrs Hunter and Macdonald personally made the Fruit Box No Termination Representations).

I.4.4 *CBA*

2245 ASIC alleges that the following continuing representations were made in respect of CBA: (1) the CBA Agreement Representations; and (2) the CBA Price Sensitivity Representation.

CBA Agreement Representations

2246 By making the CBA Announcement, by failing to qualify, withdraw or correct the CBA Announcement following its release, and by not disclosing the CBA Projection Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations on and from 4 April 2017 until the date of issue of this proceeding:

(a) an application suitable for rollout to CBA retail merchants had been developed;

(b) the CBA Agreement required CBA to use the GetSwift application developed (or to be developed) for CBA's Albert terminals to the exclusion of any competitive application for a period of five years, further or alternatively, was for a term of five years; and

(c) GetSwift had reasonable grounds for making the CBA Projections

(collectively, the **CBA Agreement Representations**).

Do the representations arise?

2247 Each of the foundational matters raised by GetSwift, including that ASIC has failed to establish that the CBA Projection Information existed,[2781] does not take the matter further for the reasons I have already discussed (at [1321]–[1349]), although it is important to recall my findings, to the extent that it matters, that I was not satisfied that factual circumstance (b) of the CBA Projection Information existed: see [1331].

2248 The only unique contention is GetSwift's submission that ASIC has failed to establish that as on 18 December 2017, GetSwift submitted to the ASX, and the ASX released, an

[2781] GCS at [428(a)].

announcement entitled "CBA and GetSwift Update".[2782] This submission seems to me to be directed to ASIC's contention that, in making the CBA Agreement Representations, GetSwift, Mr Hunter and Mr Macdonald did not qualify, withdraw or correct the CBA Announcement following its release by the ASX. It is important to have regard to my reasons (at [1363]) above; that is, I do not see how the release of this announcement can be seen as qualifying, withdrawing or correcting the CBA Announcement, given this announcement simply provided a broad update on the partnership.

2249 It is then necessary to turn to each of the CBA Agreement Representations in turn.

2250 ASIC contends that *representation (a)* of the CBA Agreement Representations arises by reason of the First Agreement After Trial Representation (by which GetSwift represented that a proof of concept or trial had been completed prior to entering into the CBA Agreement) and the express statement in the CBA Announcement that "rollouts would commence shortly to selected markets with a full national deployment expected to be in place in 2017". Given that the announcement made no mention that an app was yet to be developed, ASIC argues that the combined effect of the existing First Agreement After Trial Representation and the statements in the CBA Announcement gives rise to an implied representation to the effect that an application suitable for rollout to CBA had been developed. It says that without an application having been developed, it was not possible for any rollout to commence shortly.[2783]

2251 GetSwift launches an array of attacks in respect of this particular element: *first*, it highlights that ASIC has strayed from its pleadings, given that it does not rely on the First Agreement After Trial Representation;[2784] *secondly*, it says the First Agreement After Trial Representation was not made, and even if it was, it had no application to CBA and given that it would not have been understood by the hypothetical reasonable investor to have any application because, as Ms Gordon accepted, CBA was not an Enterprise Client;[2785] *thirdly*, the statement that "rollouts *would commence shortly*" (emphasis added) would not have conveyed to a hypothetical reasonable investor that an application suitable for rollout had already been developed, given

[2782] GCS at [428(b)].
[2783] ACS at [1739].
[2784] 4FASOC at [54].
[2785] T395.4–8 (Day 6).

that statement was "inconsistent" with the notion that a suitable application had already been developed, as it indicated that rollouts were not to commence straightaway; and *fourthly*, the market did not understand the CBA Announcement to have conveyed that a suitable app had already been developed, given the lack of any reaction to GetSwift's 18 December 2017 announcement regarding the CBA Announcement,[2786] which stated that an app for CBA's Albert devices was still being developed.[2787]

2252 It is sufficient to note that I agree with one aspect of GetSwift's submission. While I accept that the announcement stated that "full national deployment" was expected to take place that year, conveying that plans were well advanced, this does not rise to the level to convey a working app had been developed. This lack of certainty is amplified by the statement in the CBA Announcement that "rollouts would commence shortly". This conveys that there were some matters to be finalised before rollouts commenced. In all the circumstances, I am not satisfied that this representation was made.

2253 As to *representation (b)*, GetSwift contends that nothing in the CBA Agreement required CBA to use GetSwift's application exclusively for a period of five years, or that the CBA Agreement was for a term of five years. Instead, it says that the CBA Projections were "informed by [the] likely success" of the CBA partnership and that this is what the hypothetical reasonable investor would have understood as opposed to any implied representation as to the contractual term.[2788] This is, with respect, nonsense and is not what would have been understood by the hypothetical reasonable investor. The CBA Announcement contained the following express statements:

(1) "Commonwealth Bank and GetSwift sign exclusive partnership";

(2) "GetSwift … is pleased to announce that it has signed an exclusive multiyear partnership with [CBA]"; and

(3) "GetSwift estimates the deal will result in over 257,400,000 deliveries on its platform over the *next five years*, with an estimated aggregate transaction value of $9 billion".[2789]

[2786] GSW.1001.0001.0342; GSW.0003.0005.0325 at 6.
[2787] GCS at [430]–[431].
[2788] GCS at [432].
[2789] CBA Announcement (GSW.1001.0001.0454) (emphasis added).

2254 Given that the CBA Announcement did not disclose that the CBA Agreement was for a term of two years (and contained no option to renew), and given the express statement "over the next five years" which seems to me to do nothing other than convey a five-year term, I am satisfied that a natural reading of the CBA Announcement would have conveyed to the ordinary investor that GetSwift had secured an exclusive contract with CBA for five years, or alternatively, that the CBA Agreement was for a term of five years.

2255 ASIC contends that *representation (c)* of the CBA Agreement Representations arises by reason of the First Agreement After Trial Representation and the fact that GetSwift made very specific projections as to the deliveries and transaction value in the CBA Projections (i.e. 257,400,000 deliveries and transaction value of $9 billion), together with the following statement in the CBA Announcement:

> This is a game-changer for the Australian retail sector and the country's leading bank is charting new territory here…
>
> This integration will take delivery from being a fringe benefit to a norm for Australia retail and will usher in a new era [of] convenience for shoppers…
>
> Rollouts would commence shortly to selected markets with a full national deployment expected to be in place in 2017.

2256 ASIC says that the confidence conveyed in these statements and the specificity of the projections referred to in the CBA Announcement would have conveyed to an ordinary investor that there were in fact reasonable grounds for making the CBA Projections.[2790]

2257 As to this element, while GetSwift accepts that the CBA Announcement conveyed that it had reasonable grounds for making the CBA Projections, it contends that: (a) reliance on the First Agreement After Trial Representation is not pleaded in 4FASOC (at [54]); (b) in any event, the First Agreement After Trial Representation was not made; (c) if made, it was not applicable.[2791]

2258 The fact the First Agreement After Trial Representation has not been expressly pleaded in respect of the CBA Agreement Representations does not matter. This is because I do not consider the First Agreement After Trial Representation adds anything of significance in

[2790] ACS at [1741]–[1742].
[2791] GCS at [433].

relation to the making of this representation, other than as a matter of background context. I am satisfied from the express statements in the CBA Announcement that, in context, GetSwift represented it had reasonable grounds for making the CBA Projections.

2259 I therefore accept that each of the CBA Agreement Representations arises (apart from representation (a), which does not arise).

2260 GetSwift was obliged to qualify, withdraw or correct the CBA Announcement because the CBA Projection Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (a) the CBA Projection Information was materially different from, and inconsistent with, the statements made by GetSwift in the CBA Announcement; and (b) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2261 Turning to whether these representations were misleading or deceptive, or likely to mislead or deceive, GetSwift submit, from the outset, that there are a number of reasons why this has not been proved. I have already dealt with its criticism that ASIC's case is circular (see [2173]),[2792] and its contention that the CBA Projection Information has not been established (see [1321]–[1349])).[2793]

2262 Two additional matters are raised and merit specific attention:

(1) GetSwift says ASIC has failed to prove that the number of CBA retail merchants with Albert devices was in fact between 20,000 and 25,000 (as opposed to 55,000) and that there is no evidence that GetSwift knew, or ought to have known, this number.[2794]

(2) As to *representation (c)*, GetSwift submits ASIC has not discharged its onus of proving it did not have reasonable grounds for making the CBA Projections because: (a) ASIC has not proved it was unreasonable for GetSwift to have assumed the CBA Projections

[2792] GCS at [434(b)].
[2793] GCS at [434(c)].
[2794] GCS at [434(a)].

over a five year period, which it says had been approved by CBA; (b) GetSwift had been informed that the number of retail merchants was 55,000; and (c) the CBA Projections had been approved by CBA.[2795]

2263 Both of these contentions must be rejected. As to the *first* contention, the documentary evidence establishes that: (a) that the number of CBA merchants with Albert devices as at March 2017 was 20,000 to 25,000 (see Mr Budzevski's evidence at [270]); and (b) the number of CBA retail merchants with active Albert devices was even less, namely approximately 3,000: see Mr Budzevski's email to Ms Kitchen at [329]. These facts form part of the factual matrix that renders the CBA Agreement Representations misleading or deceptive. Further, while there may be no evidence that GetSwift knew the number of CBA retail merchants with Albert devices, that is not to the point. GetSwift's knowledge is not necessary for there to be a contravention of ss 1041H and 12DA. The test is objective, and it is not necessary for the conduct to have been intentional: *Butcher* (at 625 [109] per McHugh J).[2796] GetSwift's *second* contention must be rejected for the reasons that I canvass below (at [2265]) concerning why GetSwift did not have reasonable grounds for making the CBA Projections.

2264 Having disposed of these specific contentions, I should reinforce why I regard each of the CBA Agreement Representations to be misleading or deceptive, or likely to mislead or deceive (apart from representation (a), which was not made). As to representation (b), and with reference to the CBA Agreement, the actual term was not for five years and the CBA Agreement did not require CBA to use the GetSwift application to the exclusion of any competitive application for a period of five years. These representations therefore contradict the information conveyed to investors in the CBA Announcement and should be considered misleading, or likely to mislead.

2265 As to *representation (c)*, the nature of the CBA Projection Information, which was known to GetSwift, Mr Hunter and Mr Macdonald, meant that GetSwift had no reasonable grounds for making the CBA Projections. There are six reasons that fortify my view in relation to this representation:

[2795] GCS at [435(a)–(c)].
[2796] ASIC Reply at [243].

(1) GetSwift had assumed that the CBA projections were for a period of five years, despite the CBA Agreement being for two years (a fact admitted by GetSwift, Mr Hunter and Mr Macdonald);[2797]

(2) GetSwift did not adjust these projections when the term was changed from five years to two years on 27 March 2017 (see [336]);

(3) while I was not satisfied GetSwift had assumed the existence of 55,000 retail merchants of the CBA with Albert devices (see [1331]), there were multiple occasions whereby CBA queried the 55,000 figure, with the high-water mark being Ms Kitchen's email on 3 April 2017, informing GetSwift (and Mr Hunter and Mr Macdonald) that the 55,000 figure was incorrect: see [348] and [352]. Despite this being a clear indication that the figure underpinning the CBA Projection was incorrect, and GetSwift agreeing to remove the figure from the announcement (see [353]–[356]), GetSwift did not adjust, qualify or remove the CBA Projections from the CBA Announcement before releasing it;

(4) CBA had not approved the CBA Projections. Instead, CBA had alerted GetSwift that they were global figures and should be adjusted to reflect domestic numbers only (see [287], [289]) and GetSwift's purported explanation to the First and Second Aware Queries (see [374]–[380]) are inconsistent with the rationale provided by Mr Hunter (see [245]–[248]);

(5) the CBA Agreement contained certain restrictions as to the categories of retailers onto whose Albert devices the GetSwift application may be loaded, and those categories had not yet been agreed with CBA. This fact (which was admitted by GetSwift, Mr Hunter and Mr Macdonald)[2798] represented a significant risk to the number of retailers GetSwift may have ultimately been exposed to; and

(6) no application for the Albert device had been developed, or customised at the date of the CBA Announcement (admitted by GetSwift, Mr Hunter and Mr Macdonald),[2799] nor had any testing been undertaken by CBA to see whether the GetSwift application would work: see [365]. Emails exchanged between Ms Gordon and GetSwift

[2797] Defences at [48].
[2798] Defences at [48].
[2799] Defences at [48].

representatives eight months after the fact reveal technical difficulties in developing and customising the app: see [366]–[367]. While CBA took the view that it would not make an announcement until an app was ready for deployment, GetSwift chose to both announce the agreement with CBA and publish the CBA Projections, even before the scope of work involved in developing the GetSwift application for the Albert devices had been fully understood: see [331].

CBA Price Sensitivity Representation

2266 By asking, and intending for, the ASX to release the CBA Announcement as "price sensitive", ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, represented that the CBA Agreement was likely to have a material effect on the price of value of GetSwift's shares, or that GetSwift had reasonable grounds for expecting the CBA Agreement to have such an effect (together, the **CBA Price Sensitivity Representation**). ASIC further submits that to the extent the CBA Price Sensitivity Representation was a representation as to a future matter (namely that the representation was likely to have a material effect on the price or value of GetSwift's shares), then by operation of s 12BB(2) of the *ASIC Act* (the "deeming provision"), GetSwift, Mr Hunter and Mr Macdonald did not have reasonable grounds for the making of the representation on the basis that they have not adduced any evidence to the contrary.[2800] In these circumstances, it says that the CBA Price Sensitivity Representation should be taken to be misleading.

2267 GetSwift denies that the CBA Price Sensitivity Representation was misleading, and to the extent that it was a representation as to a future matter, GetSwift says that it had reasonable grounds to expect that the CBA Agreement would have a material effect on the price or value of its shares.[2801] It highlights it was a significant agreement for GetSwift to partner with CBA As Australia's largest bank, and one of its largest, oldest and most well-known corporations. It says that these considerations make it plain that there were reasonable grounds to expect the CBA Agreement to be material.[2802] Moreover, it highlights that because CBA provided GetSwift with the number of retail merchants, this provided the basis for the CBA Projections,

[2800] ACS at [1754].
[2801] GCS at [420]; Defences at [56].
[2802] GCS at [421].

which it maintains were approved by CBA. On any view, GetSwift contends that those projections provided reasonable grounds to expect that the CBA Agreement was likely to have a material effect on either the price or value of GetSwift's shares because of the size and market position of CBA.[2803] Finally, it draws upon the fact that when the CBA Agreement was announced to the market through the CBA Announcement, the announcement unquestionably had a positive material effect on GetSwift's share price.[2804]

2268 I am inclined to agree with this submission. While I accept GetSwift's reasoning in part proceeds on the basis that the CBA Projection Information was approved by CBA (despite my findings at [1341]–[1349] that this did not occur), I am simply not satisfied that if GetSwift had included the omitted CBA Projection Information in its disclosure of the CBA Agreement, the disclosure of the CBA Agreement would not have been likely to have a material effect on GetSwift's share price. ASIC's submission that the terms of the CBA Agreement, if fully disclosed, involved too much uncertainty and the announcement occurred too early in its life for there to have been any material effect on GetSwift's share price, is too speculative. In the end, it still was an agreement, no matter how frail it was, with Australia's largest bank. I therefore do not conclude that by representing that the CBA Agreement was likely to have a material effect on either the price or value of GetSwift's shares, or that GetSwift had reasonable grounds for expecting the CBA Agreement to have such an effect, that contravening conduct occurred. For completeness, I should note that to the extent ASIC relies upon the operation of the deeming provision in s 12BB(2) of the *ASIC Act*, that submission is misplaced. Here, even in the absence of direct testimony, I consider there is an obvious basis demonstrated for a reasonable expectation that the CBA Agreement was likely to have a material effect. Although there is no evidence that this basis was, in fact, relied upon by the representor, this seems to be a case where the inference that it was relied upon is compelling.

CBA Conclusions

2269 By failing to disclose the CBA Projection Information and by contributing to the drafting, approving, authorising and directing to the ASX of the CBA Announcement, I am satisfied that GetSwift and each of Messrs Hunter and Mr Macdonald personally made the CBA Agreement

[2803] GCS at [422].
[2804] GCS at [423].

Representations. As a result, each of them engaged in conduct that was misleading or deceptive, or likely to mislead or deceive. While I am satisfied that the CBA Price Sensitivity Representation was made, I am not satisfied it was misleading and deceptive.

I.4.5 *Pizza Hut*

2270 ASIC alleges that the following continuing representations were made in respect of Pizza Hut: (1) the Pizza Pan Agreement Representations; and (2) the Pizza Pan Quantifiable Benefit Representations.

Pizza Pan Agreement Representations

2271 By making statements in the Pizza Hut Announcement, by failing to qualify, withdraw or correct the Pizza Hut Announcement following its release, by making the First Agreement After Trial Representation and by not disclosing the Pizza Pan Agreement Information, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, expressly (in relation to the first) and impliedly (in relation to the balance) represented the following continuing representations in the period between 28 April 2017 until the date of issue of this proceeding:

(a) the Pizza Pan Agreement was made with a company which:

  (i) was one of the world's largest restaurant companies;

  (ii) was in control of the American pizza chain, Pizza Hut;

  (iii) had over 15,000 locations worldwide as at 2015;

(b) the Pizza Pan Agreement had, or was likely to have, worldwide application in the near future;

(c) the Pizza Pan Agreement was for a term of two or more years; and

(d) any trial period or limited roll out with Pizza Pan had been successfully completed

(collectively, the **Pizza Pan Agreement Representations**).

Do the representations arise?

2272 GetSwift's threshold points, including its Circularity Contention,[2805] or the fact that there could have been no reasonable expectation that the Pizza Pan Agreement Information should have been disclosed,[2806] do not take matters further for reasons that have already been discussed, and disposed of, above: see [2167]–[2168], and [2173].

2273 Turning to how these representations arise, GetSwift advance a number of submissions.

2274 *First*, GetSwift contends that *representation (a)* was not made by reason of the same matters that have already been discussed (at [1386]–[1389]) above, and although it accepts that Pizza Hut is a global brand, it says that the announcement made clear that the arrangement (referred to as a "partnership") concerned Pizza Hut in Australia. GetSwift further submits that the non-disclosed matters in its pleadings at [66(cc)] are not relied upon as a basis for alleging that the Pizza Pan Agreement Representations were misleading or deceptive, stating that invokes the matters pleaded at [66(a)]–[66(c)] but not [66(cc)].[2807] Finally, it is said that because these matters are not alleged to be material, there was no reasonable expectation that they should have been disclosed so as to give rise to misleading or deceptive conduct.[2808]

2275 I disagree. It is important to recall my findings above (at [1391]) that a reasonable hypothetical investor would regard the agreement signed to be with an international company because there is no reference to Pizza Pan in the Pizza Hut Announcement, but rather the international entity, Pizza Hut. As such, I am satisfied that representation (a) arises by reason of the express statements in the Pizza Hut Announcement, including that GetSwift "has signed an exclusive multiyear partnership with *Pizza Hut*", followed by express statements that "*Pizza Hut* is the largest pizza chain in the world", that "*Pizza Hut* is an American restaurant chain and international franchise", that "*Pizza Hut* has over 15,000 locations worldwide as of 2015", and "We are extremely pleased to be partnering with one of what is indisputably a *global icon*" (emphasis added). By introducing its new Enterprise Client as "Pizza Hut", GetSwift expressly represented that it had signed an agreement with Pizza Hut (being the American franchisor of

[2805] GCS at [489].
[2806] GCS at [492(e)].
[2807] 4FASOC at [66].
[2808] GCS at [491].

the Pizza Hut chain). Further, by making subsequent references to Pizza Hut (i.e. largest pizza chain, 15,000 locations worldwide), it is clear that GetSwift represented that these descriptors applied to the party that had just signed an agreement with GetSwift.

2276 GetSwift's arid pleading point that ASIC omitted to refer to 4FASOC [66(cc)] at [69] can be put to one side. The addition of [66(cc)] to the 4FASOC was a result of argument,[2809] and by reason of that argument, GetSwift was on notice as to ASIC's case in relation to the relevance of [66(cc)]. Although, in what appears to be a result of an oversight, 4FASOC does not refer to [66(cc)] at [69], there can be no doubt as to the basis upon which ASIC has advanced its case in relation to the Pizza Pan Agreement Representations.[2810] In any event, on Day 17 of the trial, Mr Darke conceded that it was clearly a mistake and that he could not point to any prejudice if [66(cc)] was added, and in those circumstances, I dispensed with the need for ASIC to file a further document.[2811]

2277 *Secondly*, ASIC contends that *representation (b)* arises by reason of the multitude of express statements in the Pizza Hut Announcement referring to Pizza Hut's "worldwide" operations, including: (a) "[GetSwift] … is pleased to announce that it has signed an exclusive multiyear partnership with Pizza Hut. Pizza Hut is the largest pizza chain *in the world* with more than 12,000 Pizza Hut Restaurants and Delivery Units *operating worldwide*; (b) "Pizza Hut is an …*international* franchise"; (c) "[Pizza Hut] has over 15,000 locations worldwide"; (d) "[Pizza Hut]…is a subsidiary of Yum! Brands, Inc, one of the *world's* largest restaurant companies"; (e) "Yum Brands, Inc….operate the brands Taco Bell, KFC, Pizza Hut, and Wingstreet worldwide"; (f) "It is one of the *world's* largest fast food restaurant companies…around the *world* in over 130 countries"; (g) "Home delivery is a fast growing segment of the pizza market *worldwide*, and Pizza Hut delivery has been at the forefront of this segment since 1985"; and (h) "We are extremely pleased to be partnering with one of what is indisputably a *global icon*" (emphasis added). ASIC submits that the fact GetSwift chose to include the above express statements about the worldwide operations of Pizza Hut in the Pizza Hut Announcement would have conveyed to an ordinary investor that worldwide operations were a relevant fact in relation

[2809] T564.15–570.8 (Day 8).
[2810] T564.15–570.8 (Day 8); ACS at [1757]–[1766].
[2811] T1101.18–40 (Day 17).

to the partnership that GetSwift had just announced with "Pizza Hut". The implied representation arising from these express statements is that when the Pizza Pan Agreement was taken as a whole, it represented that the Pizza Pan Agreement had, or was likely to have, worldwide application in the future.[2812]

2278 As to this element, GetSwift repeats its same arguments as discussed (at [1386]–[1389]) above, noting that the Pizza Hut Announcement made clear that the arrangement related to the provision of services to Pizza Hut stories in Australia.[2813] For the same reasons that I canvassed above (at [1391]), I have not reached the level of satisfaction that the announcement represented that the Pizza Pan Agreement had, or was likely to have, worldwide application in the near future. The Pizza Hut Announcement made it clear that services were to be provided "in Australia", notwithstanding any general statements about Pizza Hut being an international company.

2279 *Thirdly*, GetSwift does not appear to dispute that the *representation (c)* was made, except saying that "the Pizza Pan Agreement was a multi-year agreement, albeit that it could be brought to an end after one year and three months by the giving of written notice (which was never done)".[2814] It also takes issue with whether it was misleading or deceptive (which I will address below (see [2282(1)])).[2815] I am satisfied that this representation arises by reason of the statement that a "multiyear" agreement had been signed by GetSwift. The expression "multiyear" conveyed to an ordinary investor that the term of Pizza Pan Agreement was for two or more years.

2280 *Fourthly*, as to *representation (d)*, other than repeating its threshold issues, GetSwift contends that the Pizza Hut Announcement did not say that any trial period had been successfully completed.[2816] But that submission is of no assistance. It is important to recall that this representation arises by reason of the First Agreement After Trial Representation (by which GetSwift represented that agreements were announced *after successful completion of a proof of concept or trial*) and the express statement in the Pizza Hut Announcement which stated that

[2812] ACS at [1760]–[1761].
[2813] GCS at [492(b)].
[2814] GCS at [492(c)].
[2815] GCS at [492(c)].
[2816] GCS at [492(d)].

GetSwift had signed "an exclusive multiyear partnership" with Pizza Hut. The Pizza Hut Announcement did not contain any qualifications, nor did it disclose that the Pizza Pan Agreement involved a limited roll out. Taken together with the First Agreement After Trial Representation, I am satisfied that the statements in the Pizza Hut Announcement and the fact that the Pizza Pan Agreement was announced at all conveyed to the ordinary investor that any trial period or limited roll out with Pizza Hut had been successfully completed.

2281 Absent element (b), I accept that each of the Pizza Pan Agreement Representations arises.

Were the representations misleading or deceptive?

2282 Turning to whether each of these representations was misleading or deceptive, GetSwift advance the following specific submissions:

(1) As to *representation (c)*, GetSwift maintains that the Pizza Pan Agreement was a multi-year agreement, albeit that it could be brought to an end after one year and three months by Pizza Pan giving 90 days' notice in writing (which was never done).[2817] As such, it would appear that GetSwift contends that the representation could not be misleading.

(2) As to *representation (d)*, GetSwift relies upon Mr Branley's that a Proof of Concept Trial had taken place before entry into the Pizza Pan Agreement, and therefore there was no misleading or deceptive representation in respect of the element.[2818]

2283 These contentions do not have substance. GetSwift's contention in respect of representation (c) fails for reasons that I have already provided, namely that the Pizza Pan Agreement was not a multi-year agreement: see [1392]. Any representation that it was a multi-year agreement was therefore misleading or likely to mislead. Moreover, contrary to GetSwift's submission in respect of representation (d), the 'Proof of Concept' that Pizza Pan conducted prior to entry into the Pizza Pan Agreement was limited to technical integration of GetSwift's software with Pizza Pan's Point of Sale system: see [390]. There is no evidence that the software integration process involved live deliveries by way of trial. Rather, the evidence is that after the execution of the Pizza Pan Agreement, in September to November 2017, Pizza Pan trialled the GetSwift

[2817] GCS at [492(c)].
[2818] GCS at [492(d)].

Platform at three stores: see [441]–[443].[2819] Given that technical integration of GetSwift's system into Pizza Pan's Point of Sale System was first required for Pizza Hut to be able to test the functionality of the GetSwift system (see [400]) and at the date of the Pizza Hut Announcement, integration of the GetSwift system had not yet occurred (see [437]), I am satisfied, contrary to GetSwift's submission, that no trial or limited roll out had been completed (successfully or otherwise). Representation (d) was therefore misleading.

2284 I find representation (a) was misleading or deceptive, or likely to mislead or deceive, because the statements that GetSwift made in the Pizza Hut Announcement were materially different from, and inconsistent with, the omitted Pizza Pan Agreement Information. Moreover, representation (c) was misleading because the Pizza Pan Agreement was for an initial term of 12 months only, or even if it was for 15 months for the reasons explained above (at [1392]), this still was not "multiyear". While there were options to renew the Pizza Pan Agreement, as GetSwift correctly highlight, these were options not exercisable by GetSwift but rather Pizza Pan. Finally, given my findings that there was no trial or completion of a limited roll out, I am satisfied representation (d) was misleading.

Pizza Pan Quantifiable Benefit Representations

2285 By making the statements in the Pizza Hut Announcement, by not qualifying, withdrawing or correcting the Pizza Hut Announcement following its release, and by making the First Quantifiable Announcements Representation, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the Pizza Pan Agreement was secure, quantifiable and measurable in the period from 28 April 2017 until the date of issue of this proceeding (**Pizza Pan Quantifiable Benefit Representation**).

2286 GetSwift repeat its threshold points as well as its general Quantifiable Benefit Representation arguments: see [2219]–[2221].[2820] These contentions must be rejected. I am satisfied that from the Pizza Hut Announcement and the First Quantifiable Benefit Representation, the financial benefit could not have been secure, quantifiable or measurable to GetSwift in circumstances where the trial had not been completed, no integration had occurred, and where the parties were

[2819] ASIC Reply at [260].
[2820] GCS at [497]–[500].

still within a trial period (or limited roll out period) in which no fees were payable. As such, I am satisfied that representations were made were misleading or deceptive, or likely to mislead or deceive.

Pizza Hut Conclusions

2287 By failing to disclose the Pizza Pan Agreement Information, by reason of their conduct in relation to the First Agreement After Trial Representation, and by contributing to the drafting, approving, authorising and directing to the ASX of the Pizza Hut Announcement and the April Appendix 4C, GetSwift and each of Mr Hunter and Mr Macdonald personally made the Pizza Pan Agreement Representations (absent element (b)) and the Pizza Pan Quantifiable Benefit Representation. As a result, I am satisfied that each of them engaged in contravening conduct that was misleading or deceptive.

I.4.6 *APT*

2288 ASIC alleges that the following continuing representations were made in respect of APT: (1) the APT Agreement Representations (in respect of GetSwift and Mr Macdonald only); (2) the APT Quantifiable Benefit Representation (in respect of GetSwift and Mr Macdonald only); and (3) the APT Financial Benefit Representation (in respect of each of GetSwift, Mr Hunter and Mr Macdonald).

APT Agreement Representations

2289 By making statements in the APT Announcement, by failing to qualify, withdraw or correct the APT Announcement following its release, by making the First Agreement After Trial Representation, and by not disclosing the APT Agreement Information, ASIC submits that GetSwift, and Mr Macdonald personally, impliedly represented the following continuing representations between 8 May 2017 until the date of issue of this proceeding:

(a) any trial period with APT had been successfully completed;

(b) the APT Agreement was unconditional;

(c) the APT Agreement had commenced with a term of two or more years; and

(d) APT had entered into an agreement with GetSwift which:

(i) APT could not terminate for convenience;

(ii) further or alternatively, obliged APT to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and

(iii) further or alternatively, was for a term of two or more years

(collectively, the **APT Agreement Representations**).

Do the representations arise?

2290 Apart from repeating its Generality Contention, its argument that the First Agreement After Trial Representation was not made, or its contention that the APT Agreement Information was not material, being issues which I have already discussed, disposed of above (see [2167]–[2168], [2170]–[2171], [2176]–[2181]), there is one additional threshold point that is made in the specific context of the APT Agreement Representations.

2291 GetSwift submits that there are two difficulties that arise by reason of the evolving contractual position between GetSwift and APT. *First*, it says it is a commercial and legal absurdity that the hypothetical reasonable investor would have expected GetSwift to disclose detailed information about the status of its contractual relationship with APT on 8 May 2017, given it knew, within a matter of days or weeks, that the information was unlikely to reflect accurately the current state of affairs.[2821] *Secondly*, it is said that the first and third representations could have not been misleading because the trial period had been completed and the initial term commenced.[2822] The issue with each of these submissions is that they proceed on the false premise that the APT Agreement was varied in the manner contended for by GetSwift.[2823] For reasons that I have already explained, the APT Agreement was varied in the manner pleaded by ASIC[2824] as opposed to in accordance with what I termed "GetSwift's Variation Theory": see [1421].

2292 As to each of the representations that make up the APT Agreement Representations, GetSwift advance the following submissions.

(1) As to *representation (a)*, GetSwift submits that it did not make an express representation that "any trial with APT had been successfully completed". It says that whether any implied representation can arise depends on whether the hypothetical

[2821] GCS at [571].
[2822] GCS at [572].
[2823] ASIC Reply at [283].
[2824] 4FASOC at [81].

reasonable investor expected that the non-completion of any trial period would be disclosed which is in turn contingent on such a fact being material, which it contends was not in this case.[2825]

(2) As to *representation (b)*, GetSwift argues that it did not make any express representation that the APT Agreement was "unconditional" and repeats similar contentions to those that I have already described above: see [2228(2)].[2826]

(3) In respect of representation (c), GetSwift contends that the APT Announcement did not state that the agreement had "commenced" and that it could only have been implied. GetSwift then repeats a similar argument that it "should be rejected on the same basis", which appears to be a reference to its argument that whether any implied representation was made depends on whether the hypothetical reasonable investor expected that any commencement had to be disclosed, which could only be if it was material.2827

(4) Concerning *representation (d)*, GetSwift contends that: (i) it was not made and was not misleading, given that a hypothetical reasonable investor would not have inferred that APT "could not terminate for convenience" because the market already knew from the Prospectus that GetSwift's customers could terminate their agreements at will;[2828] (ii) although GetSwift had signed an "exclusive agreement" with APT, the hypothetical reasonable investor would not have understood that it "required" APT to use GetSwift for a period of two or more years because of their understanding of GetSwift's pay-per-use business model and the fact that GetSwift could not require a customer to make any deliveries at all over a period of time;[2829] and (iii) the APT Agreement did in fact provide a term of 37 months and could therefore not be misleading.[2830]

2293 Each of these submissions should be rejected.

2294 GetSwift's *first* contention fails because even if I am wrong about the need for materiality in the context of an express announcement being made, I am satisfied that the hypothetical reasonable investor would have expected the non-completion of a trial period would be

[2825] GCS at [576].
[2826] GCS at [577].
[2827] GCS at [578].
[2828] GCS at [580].
[2829] GCS at [581].
[2830] GCS at [582].

disclosed given I have found that the APT Agreement Information was material: at [1410]–[1417].

2295 GetSwift's *second* contention should be rejected for the reasons that I set out above: see [2231].

2296 GetSwift's *third* contention should also be rejected. By expressly stating that GetSwift had signed an "exclusive commercial *multiyear* agreement" (emphasis added) and by making the First Agreement After Trial Representation, I am satisfied that this indicated to a hypothetical reasonable investor that the term of the APT Agreement had commenced and was for a period of two or more years. This is compounded by the fact that I am satisfied representation (a) was made, namely that the parties had concluded a trial period: see [2298] below. Its reliance on whether a hypothetical reasonable investor expected any commencement to be disclosed should be rejected for similar reasons that I have already made clear, both in this section and elsewhere: see [2167]–[2168] and [2294].

2297 Finally, GetSwift's *fourth* contention is of no moment. As to (i) and (ii), GetSwift's contentions must be rejected given they echo the Perpetually on Trial and Terminable at Will Contention that I have already disposed of above: see [1117]–[1143]. GetSwift's submissions with respect to (iii) also fail to acknowledge that any term was still subject to APT terminating the agreement, which would prevent the term of two or more years from commencing.

2298 I am satisfied representations (a) and (b) of the APT Agreement Representations arise by reason of the First Agreement After Trial Representation and from the express statement in the APT Announcement that GetSwift had signed an "exclusive commercial multi-year agreement" with APT. The APT Announcement did not contain any qualifications, nor did it disclose that the three-year term of the APT Agreement was conditional on the expiry of a trial period. Taken together with the First Agreement After Trial Representation (by which GetSwift represented that agreements were announced *after* successful completion of a proof of concept or trial), I am satisfied that the statements in the APT Announcement, and the fact that the APT Agreement was announced at all, conveyed to the ordinary investor that any trial period with APT had been successfully completed and that the APT Agreement was "unconditional" (in the sense I have described above). Moreover, I am satisfied that representation (c) arises by reason of the statement that GetSwift had signed a "multi-year" agreement, and representation (d) arises by reason of the First Agreement After Trial Representation and from the express statement in the APT Announcement that GetSwift had "signed an exclusive commercial multi-year agreement" with APT.

2299 GetSwift was obliged to qualify, withdraw or correct the APT Announcement because the APT Agreement Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the APT Agreement Information was materially different from, and inconsistent with, the statements made by GetSwift in the APT Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2300 As to whether the APT Agreement Representations were misleading and deceptive, or likely to mislead or deceive, GetSwift advances the following submissions.

(1) As to *representation (b)*, if made, it was not misleading because the APT Agreement took effect at the time it was made and was not subject to any pre-conditions, and although APT had a right to terminate the agreement for any reason up to seven days prior to the expiry of the trial period, non-exercise of that right was not a pre-condition to the agreement taking effect.[2831] It said that it is only once an agreement has taken effect that it is capable of being terminated.

(2) As to *representation (c)*, GetSwift contends that at the time of the APT Announcement, the APT Agreement had commenced and it did have a term of two or more years. As such, it was not misleading or deceptive.[2832]

2301 I do not agree with GetSwift's *first* contention. Consistently with my reasons in respect of the Fruit Box Agreement Representations, a condition precedent to the substantive term of the APT Agreement becoming operative was the successful completion of a trial, subject to an early right of termination: see [2238]. Any representation that the APT Agreement was unconditional must therefore have been misleading or deceptive. Moreover, contrary to its *second* contention, at the time of the APT Announcement, only the trial period (as opposed to the initial term) had commenced. APT therefore had a contractual right to terminate during the "free trial period", which would have prevented any term from commencing.

[2831] GCS at [577].
[2832] GCS at [578].

2302 I find the APT Agreement Representations were misleading or deceptive, or likely to mislead or deceive, by reason of the First Agreement After Trial Representation (by which GetSwift represented that a proof of concept or trial had been completed before the APT Agreement was entered into and announced) and by reason of the APT Agreement Information. The APT Announcement was published at a time when the parties were still within the "free trial period" and APT had a contractual right to terminate, which if exercised, would have prevented the three-year term from commencing and would have removed any obligation of APT to use GetSwift exclusively for its last-mile delivery services. Those circumstances directly contradict the statements made in the opening paragraph of the APT Announcement that GetSwift had signed an exclusive commercial multi-year agreement with APT.

APT Quantifiable Benefit Representation

2303 By making the statements in the APT Announcement, by not qualifying, withdrawing or correcting the APT Announcement following its release and by making the First Quantifiable Announcements Representation, ASIC submits that GetSwift, and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the APT Agreement was secure, quantifiable and measurable in the period from 8 May 2017 until the date of issue of this proceeding (**APT Quantifiable Benefit Representation**).

2304 GetSwift advances similar threshold arguments and otherwise repeat its general contentions in respect of the Quantifiable Benefit Representation: see [2219]–[2221].[2833] However, these matters do not take the case further for the reasons that I provided at that section. I accept that the APT Quantifiable Benefit Representation was made and was misleading or deceptive, or likely to mislead or deceive, in the light of the APT Agreement Information. This is especially the case given the parties were still within the trial period and APT could terminate the agreement by giving seven days' prior notice, meaning that the APT Agreement would not commence and that APT was not obliged to use GetSwift exclusively for its last-mile delivery services. Given these matters, it is clear to me that the financial benefit to GetSwift from the APT Agreement could not have been secure, quantifiable and measurable.

[2833] GCS at [586]–[589].

APT Financial Benefit Representations

2305 By making statements in the APT Announcement, by failing to qualify, withdraw or correct the APT Announcement following its release, by making the First Agreement After Trial Representation, by making the APT Quantifiable Benefit Representation, and by not disclosing the APT Agreement Information or the APT No Financial Benefit Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 17 July 2017 (the date of the APT No Financial Benefit Information) until the date of issue of this proceeding:

(a) APT had successfully trialled the GetSwift Platform;

(b) the APT Agreement was unconditional;

(c) the APT Agreement had commenced with a term of two or more years;

(d) APT had made, and might continue to make, deliveries using the GetSwift Platform;

(e) APT was continuing to engage with GetSwift;

(f) the statement in the APT Announcement, namely that GetSwift had "signed an exclusive commercial multi-year agreement with APT" continued to be true; and

(g) by reason of the preceding six matters, it was likely that GetSwift would receive a financial benefit from the APT Agreement

(collectively, the **APT Financial Benefit Representations**).

Do the representations arise?

2306 GetSwift's overarching threshold contentions can be placed to one side for reasons explained above: see [2164]–[2174], [2214]–[2217].[2834]

2307 As to whether these representations arise, GetSwift advance a number of submissions:

[2834] GCS at [593]–[595].

(1) As to *representation (a)*, GetSwift contends given the First Agreement After Trial Representation was not made, and because any disclosure that APT had not successfully trialled the platform would not have been material, this representation does not arise.[2835]

(2) As to *representations (b) and (c)*, GetSwift repeats its previous arguments as to the APT Agreement being "unconditional" (see [2292(2)]) and the issue of "commencement": see [2292(3)].[2836]

(3) As to *representation (d)*, while GetSwift accepts APT had not made any deliveries using the GetSwift software, it denies that it represented APT had already made deliveries, or might continue to make deliveries, as at 17 July 2017. It says that no such representation about deliveries could reasonably be implied from the contents of the APT Announcement, which only stated GetSwift had "signed" the agreement with APT. Moreover, it contends that a hypothetical reasonable investor would not have expected GetSwift to disclose, day by day, whether APT had yet made any deliveries, given that GetSwift disclosed deliveries in its Appendix 4C announcements on a quarterly basis, and even if the Court is satisfied that the fourth alleged representation was made, insofar as the representation was about future matters,[2837] in the circumstances of its dealings with APT as described above, GetSwift had reasonable grounds to expect that APT might make deliveries using the GetSwift platform.[2838]

(4) As to *representation (e)*, it is said that it was not made for similar reasons to those canvassed in respect of its *third* contention, and that given the lack of materiality of the APT Agreement, the hypothetical reasonable investor would not have expected GetSwift to update the market continually on its ongoing interactions with APT, which fluctuated over time.[2839]

(5) While GetSwift accepts that *representation (f)* was made,[2840] it says that in respect of *representation (g)*, which arises by reason of the preceding six matters (being

[2835] GCS at [596].
[2836] GCS at [597], and [598].
[2837] C.f. 4FASOC at [93(b)]).
[2838] GCS at [599].
[2839] GCS at [601].
[2840] GCS at [602].

representations (a)–(f)), the representation "cannot succeed" on the basis that ASIC has failed to convey each of the first to fifth alleged representations.[2841]

2308 GetSwift's *first* and *second* contentions, as should be evident, are reprises of GetSwift's previous arguments and should be rejected for reasons provided above.

2309 GetSwift's *third* contention (and to the extent that it relies upon the same matters for its *fourth* contention), should also be rejected. It is important to recall that ASIC pleaded that this representation arises by reason of the APT Quantifiable Benefit Representation together with the First Agreement After Trial Representation and the fact that GetSwift never qualified, withdrew or corrected the APT Announcement following its release. This conduct impliedly conveyed to investors that APT had made, or at the very least, that it might "continue to make", deliveries using the GetSwift Platform. To the extent GetSwift contends a hypothetical reasonable investor would not have expected GetSwift to disclose, day by day, whether APT had not yet made any deliveries because that was disclosed in quarterly Appendix 4C announcements, this goes nowhere given the hypothetical reasonable investor would have expected disclosure, as the APT No Financial Benefit Information was material: see [1443]–[1449].

2310 GetSwift's *fifth* contention proceeds on a false premise in the light of my other findings above.

2311 I am satisfied that each of the APT Financial Benefit Representations arises. I am satisfied that representations (a)–(c) of the APT Financial Benefit Representations are analogous to representations (a)–(c) of the APT Agreement Representations and arise for similar reasons: see [2298]. Further, I am satisfied that representations (d) and (e) arise by reason of APT having made the First Agreement After Trial Representations and the APT Quantifiable Benefit Representation and GetSwift not having qualified, withdrawn or corrected the APT Announcement following its release, which, when taken together, impliedly represented APT had made, and might continue to make, deliveries using the GetSwift Platform and that APT was continuing to engage with GetSwift. Moreover, I am satisfied that representation (f) arises for the same reasons as representations (a)–(c) of the APT Agreement Representations, taken together with the fact that GetSwift failed to qualify, withdraw or correct the APT

[2841] GCS at [603].

Announcement following its release. Finally, representation (g) arises by reason of each of the previous representations, which represented to the ordinary investor that GetSwift would receive a financial benefit from the APT Agreement. Each of the representations was made.

2312 GetSwift was obliged to qualify, withdraw or correct the APT Announcement because the APT No Financial Benefit Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the APT No Financial Benefit Information was materially different from, and inconsistent with, the statements made by GetSwift in the APT Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representation misleading or deceptive?

2313 GetSwift advance the following submissions:

(1) As to *representations (b)–(c)*, GetSwift repeats its arguments concerning the meaning of "unconditional" and the Variation Theory (see [1421]) to contend that from 5 June 2017, the APT Agreement had re-commenced and therefore was true and not misleading.[2842]

(2) As to *representations (d) and (g)*, GetSwift submits that insofar as the representations are about future matters (i.e. "might continue to make" and "would receive"), it had reasonable grounds to expect APT might make deliveries using the GetSwift Platform and that it was likely GetSwift would receive a financial benefit from the APT Agreement in the future.[2843]

(3) As to *representation (f)*, GetSwift submits that this representation was not misleading because at 17 July 2017, the trial period had been completed and the initial term was set to commence, and because by early August 2017, GetSwift was working on customising its software and had almost completed development of a "routing engine": see [493].[2844]

[2842] GCS at [597].
[2843] GCS at [600], GCS at [603].
[2844] GCS at [602].

2314 GetSwift's *first* and *third* contentions are unpersuasive. GetSwift's *first* contention is simply repetitive: see [2301]. Moreover, to the extent that GetSwift relies on the fact that the APT Agreement had re-commenced on 5 June 2017 (in its *first* contention),[2845] or the fact that the initial term commenced on 17 July 2017 (in its *third* contention), these submissions are of no moment, given I rejected GetSwift's Variation Theory: see [1423]–[1425]. The only other point that I should make is in regards to its *second* contention. I am satisfied that GetSwift did not have reasonable grounds to expect APT might make deliveries using the GetSwift Platform or that it was likely that GetSwift would receive a financial benefit in the future from the APT Agreement. While I recognise this is an objective test, it suffices to note that, as I found above in respect of the continuous disclosure case, I am satisfied that by 17 July 2017, Messrs Hunter and Macdonald were aware that APT had not yet made any deliveries using the GetSwift Platform and APT had ceased engaging with GetSwift: see [1419]–[1433]. These objective facts, including most fundamentally the latter, demonstrate that there could be no reasonable grounds for any representation about a future matter. Moreover, what facts and circumstances the representors *actually relied upon* to give them a reasonable basis, is entirely opaque on the evidence.

2315 I consider the APT Financial Benefit Representations to be misleading or deceptive, or likely to mislead and deceive, by reason of the statements made in the APT Announcement, the failure of GetSwift to qualify, withdraw or correct the APT Announcement, the First Agreement After Trial Representation (namely that a proof of concept or trial had been completed before the APT Agreement had been entered into and announced), the APT Quantifiable Benefit Representation, the omitted APT Agreement Information, and the APT No Financial Benefit Information. Despite two months having passed after GetSwift made the APT Announcement, the evidence highlights that the free trial period under the APT Agreement had still not commenced because APT and GetSwift had agreed to defer the commencement (or alternatively extend) the trial period until such a time as APT was able to enter and route jobs on the GetSwift Platform satisfactorily. This was contrary to what was conveyed to the ordinary investor through the First Agreement After Trial Representation. Further, as the evidence shows, APT was ultimately never able to enter and route jobs on the GetSwift Platform

[2845] GCS at [598].

satisfactorily and as at 17 July 2017, was yet to make a delivery using the GetSwift Platform and, indeed, never made any deliveries. Accordingly, it was unlikely GetSwift would receive any financial benefit from the APT Agreement.

2316 I should note that I am not satisfied that Messrs Hunter and Macdonald (see [195]) made these representations personally. That is because there was no representation positivley made by either director; rather, their engagement was simply limited an the awareness of the facts which underpin the representation.

APT Conclusions

2317 By failing to disclose the APT Agreement Information (in the case of GetSwift and Mr Macdonald), by making the First Agreement After Trial Representation and by contributing to the drafting, approving, authorising and/or directing the transmission to the ASX of the APT Announcement and the April Appendix 4C, GetSwift and Mr Macdonald personally, made the APT Agreement Representations and the APT Quantifiable Benefit Representation. Further, by failing to disclose the APT No Financial Benefit Information, GetSwift made the APT Financial Benefit Representations. As a result, I am satisfied GetSwift and Mr Macdonald personally contravened s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* (noting no contravention is made out against Mr Hunter personally, or Mr Macdonald personally in respect of the APT Financial Benefit Representations).

I.4.7 *CITO*

2318 ASIC alleges that the following continuing representations were made in respect of CITO: (1) the CITO Agreement Representations; (2) the CITO Quantifiable Benefit Representation; and (3) the CITO Financial Benefit Representations.

CITO Agreement Representations

2319 By making statements in the CITO Announcement, by failing to qualify, withdraw or correct the CITO Announcement following its release, by making the First and Second Agreement After Trial Representations and by not disclosing the CITO Agreement Information, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 22 May 2017 until the date of issue of this proceeding:

(a) any trial period or limited roll out with CITO had been successfully completed;

(b) the CITO Agreement had commenced with a term of two or more years;

(c) CITO had entered into an agreement with GetSwift which:

(i) CITO could not terminate for convenience;

(ii) further or alternatively, required CITO to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and

(iii) further or alternatively, was for a term of two or more years

(collectively, the **CITO Agreement Representations**).

Do the representations arise?

2320 Apart from GetSwift repeating its threshold contentions,[2846] which do not advance its defence, a number of specific contentions are raised:

(1) As to *representation (a)*, it could not have been made because the terms of the CITO Agreement did not provide for a trial period or limited roll out, and the hypothetical reasonable investor would not have expected GetSwift to announce the non-completion of a roll out which formed no part of the arrangements that had been agreed with CITO.[2847]

(2) As to *representation (b)*, GetSwift submits that the CITO Announcement described the agreement as "multi-year", meaning that it was for a period of more than 12 months (not two or more years), and in any event, it was unlimited as to its term given it would continue indefinitely until one or other of the parties chose to terminate it.[2848]

(3) As to *representation (c)*, GetSwift argues that the hypothetical reasonable investor: (i) would not have inferred that CITO "could not terminate for convenience" because they knew from the Prospectus that GetSwift could terminate its agreements at will;[2849] (ii) would have understood that GetSwift could not require any customer to make any deliveries because of its pay-per-use model, and that from the Prospectus, CITO could terminate the CITO Agreement at will and bring an end to any exclusivity

[2846] GCS at [693]–[694].
[2847] GCS at [696].
[2848] GCS at [698].
[2849] GCS at [700].

obligation.[2850] GetSwift also repeats its argument made in respect of representation (b) above.

2321 These submissions should be rejected.

2322 GetSwift's *first* submission ignores the matters that ASIC says give rise to the representation. This particular representation is alleged to arise from the First and Second Agreement After Trial Representations (by which GetSwift represented that agreement were announced *after successful completion of a proof of concept or trial*) together with the express statement in the CITO Agreement that GetSwift had "signed an exclusive commercial multi-year agreement" with CITO. Given these matters, I am satisfied that what was conveyed to the ordinary investor was that any trial period with CITO had been successfully completed. Moreover, as to GetSwift's argument that a hypothetical reasonable investor would not have expected GetSwift to announce the non-completion of a roll out which formed no part of the arrangements that had been agreed with CITO (which presumably is advanced on the basis that it was not material in parallel to its previous contentions), this submission goes nowhere as this element does not arise by mere silence alone and, in any event, I am satisfied that the hypothetical reasonable investor would have expected the non-completion of a trial period in the context of CITO to be disclosed, given my findings (at [1460]–[1469]) that the CITO Agreement Information was material information (which included the fact that CITO had not undertaken any proof of concept, or trial phase, for the GetSwift Platform).

2323 In respect of its *second* contention, the distinction that GetSwift draws is immaterial. By stating that the agreement was "multi-year", it is clear to me that what was being conveyed to the hypothetical reasonable investor was that the CITO Agreement had a term of two or more years.

2324 GetSwift's *third* contention should also be rejected, given they are simply repetitions of GetSwift's Perpetually on Trial and Terminable at Will Contention, or have otherwise already been discussed, and disposed of above.

[2850] GCS at [702].

2325 I am satisfied the CITO Agreement Representations arise by reason of the First and Second Agreement After Trial Representation and from the express statement in the CITO Announcement which stated that GetSwift had "signed an exclusive commercial multi-year agreement" with CITO. The CITO Announcement did not contain any qualifications, nor did it disclose that the CITO Agreement was not for a fixed term. When this is taken together with the First and Second Agreement After Trial Representations (by which GetSwift represented that agreements were announced *after* the successful completion of a proof of concept or trial), the statements in the CITO Announcement and the fact that the CITO Agreement was even announced at all, conveyed to the ordinary investor that CITO could not terminate for convenience and that the CITO Agreement required CITO to use GetSwift exclusively for its last-mile delivery services for a period of two or more years.

2326 GetSwift was obliged to qualify, withdraw or correct the CITO Announcement because the CITO Agreement Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the CITO Agreement Information was materially different from, and inconsistent with, the statements made by GetSwift in the CITO Announcement and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2327 GetSwift contends:

(1) as to *representation (a)*, because there was no trial period or limited roll out under the CITO Agreement, it could not have been misleading to represent that any trial period had been completed;[2851]

(2) as to *representation (b)*, the CITO Agreement was a multi-year agreement because it would continue indefinitely until one or other of the parties chose to terminate it.[2852]

2328 These submissions should be rejected. As to the *first* contention, if there was no trial period, then it was plainly misleading to represent to investors, through the Agreement After Trial

[2851] GCS at [697].
[2852] GCS at [698].

Representations, that a trial period had been completed. As to its *second* contention, with reference to my findings at [1456], GetSwift had no assurance that the CITO Agreement would extend for any particular period, and therefore there can be no sound basis for the announced "multi-year agreement". Any representation that the CITO Agreement was a multi-year agreement was misleading or deceptive.

2329 I am satisfied that the CITO Agreement Representations were misleading or deceptive, or likely to mislead or deceive, by reason of the CITO Agreement Information, given that CITO had not undertaken any proof of concept, or trial phase, CITO had not indicated to GetSwift when, if at all, it proposed to commence using the GetSwift Platform to conduct deliveries and the CITO Agreement had no fixed term, and therefore was not a multi-year agreement.

CITO Quantifiable Benefit Representation

2330 By making the statements in the CITO Announcement, by not qualifying, withdrawing or correcting the CITO Announcement following its release and by making the First Quantifiable Announcements Representation, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the CITO Agreement was secure, quantifiable and measurable in the period from 22 May 2017 until the date of issue of this proceeding (**CITO Quantifiable Benefit Representation**).

2331 GetSwift repeats its threshold contentions and otherwise repeats similar arguments concerning the Quantifiable Benefit Representations: see [2219]–[2221].[2853] I do not consider these submissions to go anywhere. I accept this representation was made and that it was misleading because the financial benefit could not have been secure, quantifiable or measurable. This is especially the case in circumstances where GetSwift had not undertaken any proof of concept or trial phase for the GetSwift Platform, there had been no indication of when CITO proposed to commence using the GetSwift Platform, where there was no fixed term, and the CITO Agreement was not a multi-year agreement.

[2853] GCS at [706]–[710].

CITO Financial Benefit Representations

2332 By making the CITO Announcement, by failing to qualify, withdraw or correct the CITO Announcement following its release, by making the First and Second Agreement After Trial Representations, by making the CITO Quantifiable Benefit Representation, and by not disclosing the CITO Agreement Information nor the CITO No Financial Benefit Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 1 July 2017 (the date of the CITO No Financial Benefit Information) until the date of issue of this proceeding:

(a) CITO had successfully trialled the GetSwift Platform;

(b) the CITO Agreement had commenced with a term of two or more years;

(c) CITO had made, and might continue to make, deliveries using the GetSwift Platform;

(d) CITO was continuing to engage with GetSwift;

(e) the statement in the CITO Announcement that GetSwift had signed an exclusive commercial multi-year agreement with CITO continued to be true; and

(f) by reason of the preceding five matters, it was likely that GetSwift would receive a financial benefit from the CITO Agreement

(collectively, the **CITO Financial Benefit Representations**).

Do the representations arise?

2333 GetSwift advance a number of threshold arguments,[2854] which should be rejected: see [2164]–[2174], [2214]–[2217]. I will consider each of GetSwift's specific contentions in turn:

(1) As to *representation (a)*, GetSwift submits that an investor would not have expected GetSwift to make a disclosure to the market whenever a trial had not been completed, particularly in relation to a small customer like CITO. Further, it says that the hypothetical reasonable investor would only have expected GetSwift to disclose

[2854] GCS at [715].

material information, and the fact that CITO had not completed a trial period was far from material.[2855]

(2) *As* to *representation (b)*, GetSwift repeats its *second* contention advanced in respect of the CITO Agreement Representations: see [2320(1)].[2856]

(3) In respect of *representation (c)*, mirroring its argument advanced in respect of the APT Financial Benefit Representations (see [2307(3)]), while GetSwift accepts that CITO had not made any deliveries using the GetSwift Platform, it contends that no such representation could be implied from the contents of the CITO Announcement made on 22 May 2017 because it simply stated that GetSwift had "signed" the agreement with CITO, and that moreover, there was no reason why the hypothetical reasonable investor would have expected GetSwift to announce a lack of individual customer deliveries because GetSwift disclosed to the market total delivery numbers on a quarterly basis.[2857]

(4) In respect of *representation (d)*, GetSwift again takes issue with the notion of "continuing to engage", arguing that as an implied representation, it proceeds upon an incorrect assumption (and one that it says cannot have any application in the context of an immaterial customer arrangement such as the CITO Agreement) that a reasonable hypothetical investor would have expected GetSwift to inform the market each time that a customer ceased to "engage" with GetSwift. To supplement this argument, it highlights that the accuracy of the relationship would likely fluctuate over the course of the customer relationship and that it would be difficult to identify with any meaningful precision the range of conduct that might constitute "engaging with a customer".[2858]

(5) GetSwift's contention in respect of *representation (e)* proceeds along similar lines, namely that the representation was never made because the hypothetical reasonable

[2855] GCS at [717].
[2856] GCS at [719].
[2857] GCS at [720].
[2858] GCS at [723].

investor would not have expected GetSwift to announce that a contract had come to an end unless that contract were material, which it says it was not.[2859]

(6) As to *representation (f)*, GetSwift submits that this element is pleaded in the 4FASOC to have arisen "by reason of" representations (a)–(e), and that because certain representations were not conveyed, then this element must fail.[2860]

2334 These contentions do not withstand scrutiny.

2335 As to GetSwift's *first* contention, it is not to the point that CITO was a small customer. GetSwift represented to the market that CITO had successfully completed a trial period through the Agreement After Trial Representations. The representation can be said to have been made because of this finding: see [2322]. To the extent GetSwift argues that a hypothetical reasonable investor would not have expected GetSwift to disclose the fact that CITO had not completed a trial period because it was not material information overcomplicates the matter, and I need only refer to my findings above (at [2167]–[2168]), and to the extent that I am wrong about this, the CITO Agreement Information and the CITO No Financial Benefit Information were both material (see [1460]–[1469] and [1485]–[1487] respectively), and hence a hypothetical reasonable investor would expect this information to be disclosed.

2336 GetSwift's *second* contention mirrors its argument already advanced, and for the reasons that I have already given (at [2323]), is without substance.

2337 Further, the *third* contention, as noted, appears to be a repetition of an argument that GetSwift has already raised (at [2307(3)]) and should be rejected for the same reasons: see [2309]. GetSwift impliedly represented to investors that CITO had made, or at the very least, might "continue to make", deliveries using the GetSwift platform by reason of the combination of GetSwift having made the First and Second Agreement After Trial Representations and the CITO Quantifiable Benefit Representation, and GetSwift not having qualified, withdrawn or corrected the CITO Announcement following its release.

2338 GetSwift's *fourth* contention is simply not to the point for reasons that I have already canvassed above (see [2167]–[2168]), and in any event, even if I am wrong to distinguish this case from

[2859] GCS at [724].
[2860] 4FASOC at [108(k)].

Myer Holdings, I am satisfied that the hypothetical reasonable investor would have expected this representation to be disclosed, given I have found (at [1485]–[1487]) that the CITO No Financial Benefit information (which related to CITO's engagement with the GetSwift Platform, such as the fact that CITO had not at any time requested or been provided, or sought access to the GetSwift Platform any of the services referred to in the CITO Agreement, that CITO had not at any time made any deliveries using the GetSwift Platform, or that CITO had not at any time made any payment to GetSwift) was material information.

2339 GetSwift's *fifth* contention is misplaced because the CITO Agreement was material information: see [1460]–[1469].

2340 Finally, in the light of my conclusions as to the balance of the representations, GetSwift's *sixth* contention can go nowhere.

2341 Having disposed of each of these contentions, I conclude the CITO Financial Benefit Representations arise. Representations (a) and (b) are materially the same as the first and second of the CITO Agreement Representations and arise for the same reasons as set out above: see [2325]. Moreover, representations (c) and (d) arise by reason of the combination of CITO having made the First and Second Agreement After Trial Representations and the CITO Quantifiable Benefit Representation and GetSwift's failure to qualify, withdraw or correct the CITO Announcement following its release. This conduct, when taken together, impliedly represented to investors that CITO had made, and might continue to make, deliveries using the GetSwift Platform and that CITO was continuing to engage with GetSwift. Representation (e) arises for the same reasons as representations (a)–(c) of the CITO Agreement Representations, taken together with GetSwift failure to have qualified, withdrawn or corrected the CITO Announcement following its release. Finally, representation (f) arises by reason of the matters referred to in representations (a)–(e).

2342 GetSwift was obliged to qualify, withdraw or correct the CITO Announcement because the CITO No Financial Benefit Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the CITO No Financial Benefit Information was materially different from, and inconsistent with, the statements made by GetSwift in the CITO Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2343 Turning to whether the CITO No Financial Benefit Representations were misleading or deceptive, it is necessary to address the following:

(1) As to *representations (a) and (b)*, GetSwift repeats its arguments above (at [2327]) to contend these representations were not misleading or deceptive, or likely to mislead or deceive.[2861]

(2) GetSwift contends that *representation (c)* was not misleading because CITO undertook training on 16 May 2017, and that Mr Calleja made statements to the effect that he believed in GetSwift's software and that it would be something of real value to CITO's business, which were statements that were made to the ATN.[2862] In other words, it is said that GetSwift had reason to believe that, having signed the CITO Agreement, CITO would go on to make deliveries using the GetSwift Platform.[2863] GetSwift also repeats similar contentions that because GetSwift had reason to believe that CITO would go on to make deliveries, to the extent that it was based on a representation as to future matters, it was based on reasonable grounds.[2864]

(3) GetSwift submits that *representation (d)* was not misleading because CITO never exercised its right to terminate the CITO Agreement and it remained true, on and from 1 July 2017, that GetSwift had signed the CITO Agreement.[2865]

2344 My reasons above (at [2328]) are sufficient to dispose of GetSwift's *first* argument.

2345 Further, GetSwift's *second* contention is of no moment given I do not conclude training was ever conducted, and because Mr Calleja's comments simply establish that he may have seen GetSwift's platform in action, which, to my mind, is quite different to being provided access to the platform, or even making deliveries: see [1478].

2346 As to its *third* contention, while the CITO Agreement remained on foot and therefore CITO was continuing to engage with GetSwift, I think that mischaracterises the representation alleged

[2861] GCS at [718]–[719].
[2862] GCS at [721].
[2863] GCS at [722].
[2864] GCS at [722].
[2865] GCS at [724].

by ASIC. The fact is CITO had not sought access to or been provided with access to the GetSwift Platform, had not made deliveries, had not made payment and did not intend to make deliveries. Mr Calleja also explained he had no contact with any representative of GetSwift since late June 2017: see [559]. CITO was not continuing to engage in any meaningful way with GetSwift. I am satisfied this representation was misleading. Finally, its *fourth* contention fails for the same reasons as its *second* contention.

2347 I should note, for completeness, that in respect of its *second* contention, in insofar as representation (c) was a representation about future matters (i.e. "might continue to make"), GetSwift did not have reasonable grounds to expect that CITO might make deliveries using the GetSwift Platform in the future. The same can be said about representation (f), which although not addressed by GetSwift, is also best characterised as a future representation, as it relates to how GetSwift would likely receive a financial benefit from the CITO Agreement in the future. Similarly to my reasons above (at [2314]), while I recognise this is an objective test, it suffices to note that, as I found above in respect of the continuous disclosure case, I am satisfied that as at 1 July 2017, GetSwift, and Messrs Hunter and Macdonald, were each aware of the CITO No Financial Benefit Information: see [1480]–[1483]. This included the objective facts that: (a) CITO had not at any time requested or been provided with any of the services referred to in the CITO Agreement; (b) CITO had not at any time sought access to or been provided with access to the GetSwift Platform; (c) CITO had not at any time made any deliveries using the GetSwift Platform; and (d) CITO had not at any time made any payment to GetSwift. It seems to me that based on these objective facts, and absent evidence as to what facts were *actually relied* upon, I am satisfied that there were no reasonable grounds for GetSwift to assert that it would continue to make deliveries or would receive a financial benefit from the CITO Agreement in the future.

2348 The CITO Financial Benefit Representations were misleading or deceptive by reason of the statements made in the CITO Announcement, the fact that GetSwift failed to qualify, withdraw or correct the CITO Announcement, the First and Second Agreement After Trial Representations (namely that a proof of concept or trial had been completed before the CITO Agreement was entered into and announced), the CITO Quantifiable Benefit Representation, the (omitted) CITO Agreement Information, the CITO No Financial Benefit Information, as well as Mr Calleja's evidence: see [559]. Moreover, CITO did not have access to the GetSwift Platform, had not made any payment to GetSwift, and had made it abundantly clear that it did not intend to make deliveries using the GetSwift Platform. Given that FRF Couriers was

engaged to provide delivery services (and not CITO), it is evident that the CITO Agreement would not be generating any revenue or financial benefit to GetSwift from CITO in the foreseeable future. I should note that I am not satisfied that Messrs Hunter and Macdonald should be held personally liable for the CITO Financial Benefit Representations, given they played no active role in making these representations.

CITO Conclusions

2349 By failing to disclose the CITO Agreement Information, by reason of their conduct in relation to the First and Second Agreement After Trial Representations, and by contributing to the drafting, approving, authorising and directing the transmission to the ASX of the CITO Announcement and the April Appendix 4C, GetSwift and Mr Hunter and Mr Macdonald (personally) made the CITO Agreement Representations and the CITO Quantifiable Benefit Representation. I have found GetSwift only made the CITO Financial Benefit Representations. As a result, each of them engaged in contravening conduct subject to the qualifications I have indicated.

I.4.8 *Hungry Harvest*

2350 ASIC alleges that the following continuing representations were made in respect of Hungry Harvest: (1) the Hungry Harvest Agreement Representations (in respect of GetSwift and Mr Macdonald only); and (2) the Hungry Harvest Quantifiable Benefit Representation (in respect of GetSwift and Mr Macdonald only).

Hungry Harvest Agreement Representations

2351 By making statements in the Hungry Harvest Announcement, by failing to qualify, withdraw or correct the Hungry Harvest Announcement following its release, by making the First and Second Agreement After Trial Representations and by not disclosing the Hungry Harvest Agreement Information, ASIC submits that GetSwift, and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 1 June 2017 until the date of issue of this proceeding:

(a) any trial period with Hungry Harvest had been successfully completed;

(b) the Hungry Harvest Agreement was unconditional;

(c) Hungry Harvest had entered into an agreement with GetSwift which:

(i) Hungry Harvest could not terminate for convenience;

(ii) further or alternatively, required Hungry Harvest to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and

(iii) further or alternatively, was for a term of two or more years

(collectively, the **Hungry Harvest Agreement Representations**).

Do the representations arise?

2352 Predictably, GetSwift advances the same threshold points,[2866] but these do not advance its defence for the same reasons that I have provided earlier: see [2164]–[2174].

2353 Turning to each of the alleged representations, GetSwift advance the following submissions:

(1) as to *representation (a)*, it is said that a hypothetical reasonable investor would not have expected the existence of status of any trial period to be disclosed because it was not material;[2867]

(2) as to *representation (b)*, GetSwift repeats its contentions concerning the meaning of "unconditional";[2868]

(3) as to *representation (c)(i)*, GetSwift repeats its Terminable At Will Contention to say that the hypothetical reasonable investor is likely to be held to have known that GetSwift's clients could terminate at will;[2869]

(4) as to *representation (c)(ii)*, GetSwift repeats the Perpetually on Trial and Terminable at Will Contention to say the hypothetical reasonable investor is likely to have known that Hungry Harvest could terminate at will and bring an end to exclusivity;2870 and

(5) As to *representation (c)(iii)*, it was not misleading because the agreement in fact provided for a term of 38 months.[2871]

2354 I have dealt with each of these contentions (see, e.g., [2230]–[2233] and [2294]–[2297] above) in some form or another, and there is no need for me to repeat myself (at least, no more than I

[2866] GCS at [744]–[745].
[2867] GCS at [746(a)].
[2868] GCS at [746(b)].
[2869] GCS at [746(c)].
[2870] GCS at [746(d)].
[2871] GCS at [746(e)].

have already done). It suffices to say, I am satisfied that representations (a) and (b) arise by reason of the First and Second Agreement After Trial Representations, and the express statement in the Hungry Harvest Announcement which stated that GetSwift had signed an "exclusive multiyear partnership" with Hungry Harvest. The Hungry Harvest Announcement did not contain any qualification, nor did it disclose that the parties were in a trial period and that the three-year term of the Hungry Harvest Agreement was conditional on the expiry of a trial period. Taken together with the First and Second Agreement After Trial Representations, the statements in the Hungry Harvest Announcement, and the fact that the Hungry Harvest Announcement was released, conveyed to the ordinary investor that any trial period with Hungry Harvest had been successfully completed and that the Hungry Harvest Agreement was unconditional. Moreover, representation (c) arises by reason of the First and Second Agreement After Trial Representations, together with the express statement in the Hungry Harvest Announcement, which stated that GetSwift had "signed an exclusive multiyear partnership" with Hungry Harvest.

2355 GetSwift was obliged to qualify, withdraw or correct the Hungry Harvest Announcement because the Hungry Harvest Agreement Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the Hungry Harvest Agreement Information was materially different from, and inconsistent with, the statements made by GetSwift in the Hungry Harvest Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2356 To the extent that GetSwift's submissions address this issue, its contentions are repetitive of its arguments that have been previously been raised and rejected, and my comments in respect of, for example, the Fruit Box Agreement Representations (at [2237]–[2238]) and the APT Agreement Representations (at [2300] and [2301]) are instructive.[2872]

2357 The Hungry Harvest Agreement Representations were misleading or deceptive, or likely to mislead or deceive, by reason of the Hungry Harvest Agreement Information. The Hungry

[2872] GCS at [746(a)–(e)].

Harvest Announcement was published at a time when the parties were still within a trial period. Contrary to the Hungry Harvest Agreement Representations, the three-year term of the Hungry Harvest Agreement was conditional on the expiry of the trial period, during which Hungry Harvest was permitted to terminate the agreement. If Hungry Harvest exercised its right to terminate, this would have prevented the three-year term from commencing and would have removed any obligation of Hungry Harvest to use GetSwift exclusively for its last-mile delivery services. Those circumstances contradict the statements made in the Hungry Harvest Announcement that GetSwift had signed an exclusive multiyear partnership with Hungry Harvest.

Hungry Harvest Quantifiable Benefit Representation

2358 By making the statements in the Hungry Harvest Announcement, by not qualifying, withdrawing or correcting the Hungry Harvest Announcement following its release, and by making the First Quantifiable Announcements Representation, ASIC submits that GetSwift, and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the Hungry Harvest Agreement was secure, quantifiable and measurable in the period from 1 June 2017 until the date of issue of this proceeding (**Hungry Harvest Quantifiable Benefit Representation**).

2359 GetSwift raise similar threshold matters in respect of the Hungry Harvest Quantifiable Benefit Representation or otherwise repeat the same formulaic arguments concerning the Quantifiable Benefit Representations, which I have disposed of above: see [2219]–[2221].[2873] I am satisfied that the representation was in fact made and was misleading or likely to mislead. The financial benefit could not have been secure, quantifiable or measurable in the light of the Hungry Harvest Agreement Information (information which was admitted by GetSwift and Mr Macdonald),[2874] including the fact that the Hungry Harvest Agreement contained a trial period which the parties were still within, that Hungry Harvest was permitted to terminate the Hungry Harvest Agreement during the trial period, and if terminated, the Hungry Harvest Agreement would not commence and Hungry Harvest would not be obliged to use the GetSwift Platform.

[2873] GCS at [750]–[754].
[2874] Defences at [118].

Conclusion

2360 By failing to disclose the Hungry Harvest Agreement Information, by reason of their conduct in relation to the First and Second Agreement After Trial Representations, and by contributing to the drafting, approving, authorising and directing the transmission to the ASX of the Hungry Harvest Announcement and the April Appendix 4C, GetSwift, and Mr Macdonald personally, made the Hungry Harvest Agreement Representations and the Hungry Harvest Quantifiable Benefit Representation. As a result, I am satisfied that each of them engaged in conduct that was misleading or deceptive.

I.4.9 *First Placement*

2361 ASIC alleges that the following representations were made in respect of the First Placement: (1) the Tranche 1 Cleansing Notice Representation; and (2) the Tranche 2 Cleansing Notice Representation.

Tranche 1 Cleansing Notice Representation

2362 By authorising the publication of the Tranche 1 Cleansing Notice without qualification, ASIC submits that GetSwift, and each of Messrs Hunter and Macdonald personally, represented that there was no further information concerning GetSwift that a reasonable person would expect to have a material effect on the price or value of GetSwift's shares which GetSwift had not disclosed to the ASX prior to submitting that Notice (**Tranche 1 Cleansing Notice Representation**). Indeed, I have found that Messrs Hunter and Macdonald had knowledge that the Tranche 1 Cleansing Notice had been released by the ASX, were aware of its contents and authorised it to be made: see [1501].

2363 The Tranche 1 Cleansing Notice Representation, which concerned the state of affairs made at the time of the Notice, arises by reason of the Tranche 1 Cleansing Notice. The Notice expressly stated: it was being issued under s 708A(5)(e) of the *Corporations Act* (which states that a sale offer does not need disclosure if a body, or both the body and the controller, give the market operator a compliant notice before the sale offer is made); GetSwift was subject to regular reporting and disclosure obligations; and that GetSwift had complied with s 674 of the *Corporations Act* at the date of the Notice. It follows that from this representation, each of GetSwift, and Mr Hunter and Mr Macdonald personally, represented that there was no other information required to be disclosed pursuant to GetSwift's obligations.

2364 I accept that the Tranche 1 Cleansing Notice Representation was misleading, or likely to mislead, by reason of my previous findings that at the time of making of the Tranche 1 Cleansing Notice Representation, GetSwift had not notified the ASX of the First Placement Information: see [1502]–[1503]. Given I was satisfied each item of the constituent parts of the First Placement Information was material, it follows the Tranche 1 Cleansing Notice Representation was misleading because the First Placement Information was information that a reasonable person would expect to have a material effect on the price or value of shares, but which was not disclosed in the Tranche 1 Cleansing Notice.

2365 For completeness, I should note that GetSwift's only contention in relation to the Tranche 1 Cleansing Notice Representation and the Tranche 2 Cleansing Notice (which I will discuss below at [2366]–[2367]) is that ASIC has not established each individual element of the First Placement Information and the Second Placement Information did not constitute material information and therefore GetSwift had not engaged in misleading and deceptive conduct.[2875] ASIC's case in respect of the First Placement relates only to misleading and deceptive conduct, but GetSwift's contentions repeat its general "all or nothing" case as to the materiality of the omitted information pertaining to each of the ASX announcements up until the date of the First Placement. For similar reasons that I have given above, ASIC has not advanced an "all or nothing" case and this argument must be rejected. It follows, from this conclusion that I do not consider that ASIC's case fails if it does not establish that *all* of the First Placement Information was material.[2876]

Tranche 2 Cleansing Notice Representation

2366 By authorising the publication of the Tranche 2 Cleansing Notice without any qualification, ASIC submits that GetSwift, and each of Mr Hunter and Mr Macdonald personally, represented that there was no further information concerning GetSwift that a reasonable person would expect to have a material effect on the price or value of GetSwift's shares which GetSwift had not disclosed to the ASX prior to submitting that Notice (**Tranche 2 Cleansing Notice Representation**). The Tranche 2 Cleansing Notice Representation arises in similar circumstances as outlined in respect of the Tranche 1 Cleansing Notice: see [2363]. Indeed,

[2875] GCS at [1287]–[1292].
[2876] ASIC reply [417] – [419].

Messrs Hunter and Macdonald had knowledge that the Tranche 2 Cleansing Notice had been released by the ASX, were aware of its contents and authorised it to be made: see [1504].

2367 I accept that by reason of GetSwift having not notified the ASX of the First Placement Information, the Tranche 2 Cleansing Notice Representation was misleading or deceptive, or likely to mislead or deceive. The First Placement Information was information that a reasonable person would expect to have a material effect on the price or value of GetSwift's shares. GetSwift's contentions, as noted above (see [2365]), are of no moment.

Conclusion

2368 By making the Tranche 1 and Tranche 2 Cleansing Notice Representations, and by authorising them to be made (see [1501] and [1504] respectively), GetSwift and each of Mr Hunter and Mr Macdonald personally, engaged in conduct that was misleading or deceptive, or likely to mislead or deceive investors and potential investors. As such, each engaged in conduct in contravention of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

I.4.10 *Fantastic Furniture*

2369 ASIC alleges that the following continuing representations were made in respect of Fantastic Furniture:

(1) the Fantastic Furniture Agreement Representations (in respect of GetSwift, Mr Hunter and Mr Macdonald);

(2) the Fantastic Furniture Quantifiable Benefit Representation (in respect of GetSwift, Mr Hunter and Mr Macdonald;

(3) the Fantastic Furniture No Termination Representation (in the case of GetSwift and Mr Macdonald only); and

(4) the Second Fantastic Furniture No Termination Representation (in the case of GetSwift and Mr Macdonald only).

Fantastic Furniture Agreement Representations

2370 By making the Fantastic Furniture & Betta Homes Announcement, by failing to qualify, withdraw or correct the Fantastic Furniture & Betta Homes Announcement following its release, by making the First and Second Agreement After Trial Representations and by not disclosing the Fantastic Furniture Agreement Information, ASIC submits that GetSwift, and each of Mr Hunter and Mr Macdonald personally, impliedly represented the following

continuing representations in the period between 23 August 2017 until the date of issue of this proceeding:

(a) any trial period with Fantastic Furniture had been successfully completed;

(b) the Fantastic Furniture Agreement was unconditional; and

(c) Fantastic Furniture had entered into an agreement with GetSwift which Fantastic Furniture could not terminate for convenience; further or alternatively, required Fantastic Furniture to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; further or alternatively, was for a term of two or more years

(collectively, the **Fantastic Furniture Agreement Representations**).

Do the representations arise?

2371 GetSwift repeats its formulaic threshold points, which I reject.[2877] Moreover, its specific contentions in respect of each element of the Fantastic Furniture Agreement Representations are merely repetitions of arguments dealt with above, including those as to materiality, the meaning of "unconditional", and that the term of the agreement was for 38 months: see, e.g., [2228], [2292], and [2353].[2878] Each of these arguments fails for the reasons that I have already given.

2372 I accept that representations (a) and (b) arise by reason of the First and Second Agreement After Trial Representations, and the express statement in the Fantastic Furniture & Betta Homes Announcement that GetSwift had signed an "exclusive commercial multi-year agreement" with Fantastic Furniture. The Fantastic Furniture & Betta Homes Announcement did not contain any qualifications, nor did it disclose that the Fantastic Furniture Agreement contained a trial period ending on 1 October 2017, that the parties were still within the trial period or that the Fantastic Furniture Agreement was conditional on the expiry of a trial period. Taken together with the First and Second Agreement After Trial Representations, the statements in the Fantastic Furniture & Betta Homes Announcement, conveyed to the ordinary investor that any trial period with Fantastic Furniture had been successfully completed and that

[2877] GCS at [804]–[806].
[2878] GCS at [807(a)–(c)].

the Fantastic Furniture Agreement was unconditional, in the sense I have described above: see [2231]. I am also satisfied that representation (c) arises by reason of the First and Second Agreement After Trial Representations, together with the express statement in the Fantastic Furniture & Betta Homes Announcement, which stated that GetSwift had signed a "commercial multi-year agreement" with Fantastic Furniture.

2373 GetSwift was obliged to qualify, withdraw or correct the Fantastic Furniture & Betta Homes Announcement because the Fantastic Furniture Agreement Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because the Fantastic Furniture Agreement Information was materially different from, and inconsistent with: (i) the statements made by GetSwift in the Fantastic Furniture & Betta Homes Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2374 As noted above, GetSwift's submissions are simply repetitive of arguments already raised and rejected.[2879]

2375 The Fantastic Furniture Agreement Representations were misleading or deceptive, or likely to mislead or deceive, by reason of the First and Second Agreement After Trial Representation and by reason of the Fantastic Furniture Agreement Information. The Fantastic Furniture & Betta Homes Announcement was published at a time where the parties were still within the "free trial period" and Fantastic Furniture had a contractual right to terminate. If exercised, it would have prevented the three-year term from commencing and would have removed any obligation of Fantastic Furniture to use GetSwift exclusively for its last-mile delivery services. These consequences contradict the statements made in the opening paragraph of the Fantastic Furniture & Betta Homes Announcement that GetSwift had signed an exclusive commercial multi-year agreement with Fantastic Furniture.

[2879] GCS at [807(a)–(c)].

Fantastic Furniture Quantifiable Benefit Representation

2376 By making the statements in the Fantastic Furniture & Beta Homes Announcement, by not qualifying, withdrawing or correcting the Fantastic Furniture & Beta Homes Announcement following its release and by making the First Quantifiable Announcements Representation, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the Fantastic Furniture Agreement was secure, quantifiable and measurable in the period from 23 August 2017 until the date of issue of this proceeding (**Fantastic Furniture Quantifiable Benefit Representation**).

2377 GetSwift raise similar threshold matters or otherwise repeat the same arguments concerning the Quantifiable Benefit Representations: see [2219]–[2221].[2880] These are not of significance for reasons I have explained. The Fantastic Furniture Quantifiable Benefit Representation was made and the statements were misleading or deceptive, or likely to mislead or deceive. The financial benefit could not have been secure, quantifiable or measurable by reason of the Fantastic Furniture Agreement Information – information which was admitted by GetSwift, Mr Macdonald and Mr Hunter in their defences – given that this information would have revealed that the Fantastic Furniture Agreement had a trial period that the parties were still within, which Fantastic Furniture could terminate at any time up to seven days prior to its expiration, which would prevent the agreement from commencing and Fantastic Furniture being obliged to use the GetSwift Platform exclusively.[2881]

Fantastic Furniture No Termination Representation

2378 By making the Fantastic Furniture & Betta Homes Announcement, by failing to qualify, withdraw or correct the Fantastic Furniture & Betta Homes Announcement following its release, and by not disclosing the Fantastic Furniture Termination Information, ASIC submits that GetSwift, and Mr Macdonald personally, impliedly represented the following continuing representations in the period on and from 22 September 2017 until the date of issue of this proceeding:

(a) the Fantastic Furniture Agreement had not been terminated;

[2880] GCS at [820]–[825].
[2881] Defences at [133].

(b) GetSwift continued to have an agreement with Fantastic Furniture which required Fantastic Furniture to use GetSwift exclusively for its last-mile delivery services for a period of two or more years;

(c) Fantastic Furniture had successfully trialled the GetSwift Platform; and

(d) that the statements in the Fantastic Furniture & Betta Homes Announcement that GetSwift had signed an "exclusive commercial multi-year agreement" with Fantastic Furniture continued to be true

(collectively, the **Fantastic Furniture No Termination Representation**).

2379 GetSwift repeats its threshold points as to the circularity in ASIC's argument (namely, that these representations are alleged to be misleading or deceptive by reason of the very same matters that are said to give rise to the representations, as well as the Fantastic Furniture Agreement Termination Information),[2882] which I do not accept: see [2173]. Additionally, there are three points that are raised (although they are ultimately repetitions of previous arguments raised elsewhere tailored to the specific facts):

(1) GetSwift asserts that this is a case that concerns non-disclosure (or nothing more than silence from 22 September 2017) and so it can only arise in circumstances where there was a reasonable expectation of disclosure. Given that, it says, the Fantastic Furniture Termination Information was not material, GetSwift submits that there could have been no such expectation.[2883]

(2) GetSwift contends that the position as at 22 September 2017 is problematic, drawing upon its (idiosyncratic) position that the Fantastic Furniture Agreement had not been terminated because Mr Nguyen still wanted to use the platform to conduct trial runs, or that the "project [had] been put on hold" (notwithstanding Mr Nguyen's email to Mr clothier on 22 September 2017 giving "notice"): see [637].[2884]

[2882] GCS at [820].
[2883] GCS at [822]–[823].
[2884] GCS at [824].

(3) GetSwift third contention appears to follow from its second contention in that GetSwift contends that the representation (d) remained true because "GetSwift had signed such an agreement".[2885]

2380 These contentions do not withstand scrutiny.

2381 GetSwift's *first* contention should be rejected in any event because GetSwift had an obligation to disclose the Fantastic Furniture Termination Information given it was material under s 674 of the *Corporations Act* (see [1531]–[1538]), and hence the hypothetical reasonable investor would have had a reasonable expectation of disclosure. GetSwift's *second* and *third* contentions proceed on the false premise that Mr Nguyen's 22 September 2017 email did not serve as "notice"; it clearly did: "Please accept this email as formal notice that we will not proceed after the trial period (1st of October)": see [1518]–[1528]. I am satisfied that Fantastic Furniture had terminated the agreement, and although GetSwift might have harboured a hope that the contract could be resurrected in some form, that would have required a new agreement.

2382 Having disposed of each of these specific contentions, and in the light of the Fantastic Furniture Termination Information, which meant that the matters as previously announced to the ASX in the Fantastic Furniture & Betta Homes Announcement were not true, I conclude the Fantastic Furniture No Termination Representation were made and were misleading or likely to mislead. GetSwift did not have an exclusive three-year agreement with Fantastic Furniture. I am not satisfied, however, that Mr Macdonald personally contravened a statutory norm in respect of the representations. They are implied, and are not linked to a positive action on their part.

Second Fantastic Furniture No Termination Representation

2383 On 30 November 2017, a document entitled "2017 Annual General Meeting Presentation" was submitted to, and released by, the ASX. The document contained the Fantastic Furniture corporate logo on a page entitled "Major Customer Announcements".[2886] The slide was in the following terms:

[2885] GCS at [825].
[2886] GSW.1001.0001.0293.

2384 By this conduct, it is alleged that GetSwift impliedly represented that the Fantastic Furniture Agreement had not been terminated on and from 30 November 2017 until the date of issue of this proceeding (**Second Fantastic Furniture No Termination Representation**).

2385 GetSwift relies upon its discussion in relation to the Fantastic Furniture No Termination Representation,[2887] but for the reasons canvassed above, that does not take its defence further. I am satisfied that the Second Fantastic Furniture No Termination Representation was made and was misleading or deceptive, or likely to mislead or deceive, for the reasons that I have already articulated above in respect of the Fantastic Furniture No Termination Representation. However, there is no evidence as to who drafted the presentation, and I am therefore not satisfied that Mr Macdonald should be found to have personally made the Second Fantastic Furniture No Termination Representation.

Conclusion

2386 By failing to disclose the Fantastic Furniture Agreement Information (and the Fantastic Furniture Termination Information in the case of GetSwift and Mr Macdonald), by reason of

[2887] GCS at [827].

their conduct in relation to the First and Second Agreement After Trial Representations, and by contributing to the drafting, approving, authorising and directing the transmission to the ASX of the Fantastic Furniture & Betta Homes Announcement and the April Appendix 4C, GetSwift, and Mr Hunter and Mr Macdonald personally, made the Fantastic Furniture Agreement Representations and the Fantastic Furniture Quantifiable Benefit Representation. However, I am only satisfied that GetSwift made the Fantastic Furniture No Termination Representation and the Second Fantastic Furniture No Termination Representation. With these qualifications in mind, I am satisfied that each of them engaged in conduct that was misleading or deceptive, or likely to mislead or deceive investors and potential investors.

I.4.11 *Betta Homes*

2387 ASIC alleges that the following continuing representations were made in respect of Betta Homes: (1) the Betta Homes Agreement Representations; (2) the Betta Homes Quantifiable Benefit Representation; and (3) the Betta Homes Financial Benefit Representations.

Betta Homes Agreement Representations

2388 By making the Fantastic Furniture & Betta Homes Announcement, by failing to qualify, withdraw or correct the Fantastic Furniture & Betta Homes Announcement following its release, by making the First and Second Agreement After Trial Representations and by not disclosing the Betta Homes Agreement Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 23 August 2017 until the date of issue of this proceeding:

(a) any trial period with Betta Homes had been successfully completed;

(b) the Betta Homes Agreement was unconditional; and

(c) Betta Homes had entered into an agreement with GetSwift which Betta Homes

  (i) could not terminate for convenience;

  (ii) further or alternatively, required Betta Homes to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and

  (iii) further or alternatively, was for a term of two or more years

(collectively, the **Betta Homes Agreement Representations**).

Do the representations arise?

2389 GetSwift repeats its threshold points,[2888] and otherwise repeats the same three arguments that I have already described in relation to, for example, Fruit Box: see [2228].[2889] The only difference here is in respect of the term of the Betta Homes Agreement, which was said to be 20 months, made up of a two-month trial period and an 18-month "initial term" which commenced if Betta Homes provided notice in writing that it elected to continue for the Initial Term). In any event, I note that this does not change the effect of any legal argument. For reasons already outlined, I reject these submissions.

2390 I accept that representations (a) and (b) arise by reason of the First and Second Agreement After Trial Representation and the express statement in the Fantastic Furniture & Betta Home Announcement that GetSwift had signed an "exclusive commercial multi-year agreement" with Betta Homes. The Fantastic Furniture & Betta Home Announcement did not contain any qualifications, nor did it disclose that the parties were in a trial period and that the 18-month term of the Betta Homes Agreement was conditional on Betta Homes "opting in" to the agreement during the trial period. Taken together with the First and Second Agreement After Trial Representations (by which GetSwift represented that agreements were announced after successful completion of a proof of concept or trial), the statements in the Fantastic Furniture & Betta Homes Announcement and the fact that the Betta Homes Agreement was announced at all conveyed to the ordinary investor that any trial period with Betta Homes had been successfully completed and that the Betta Homes Agreement was unconditional. Moreover, as to representation (c), this arises by reason of the First and Second Agreement After Trial Representations, together with the express statement in the Fantastic Furniture & Betta Homes Announcement, which stated that GetSwift had signed a "commercial multi-year agreement" with Betta Homes.

2391 GetSwift was obliged to qualify, withdraw or correct the Fantastic Furniture & Betta Homes Announcement because the Betta Homes Agreement Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the Betta Homes Agreement Information was

[2888] GCS at [884]–[886].
[2889] GCS at [887(a)–(c)].

materially different from, and inconsistent with, the statements made by GetSwift in the Fantastic Furniture & Betta Homes Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2392 To the extent that GetSwift's submissions address this issue, its arguments are simply repetitive of previous contentions, which I have rejected.[2890]

2393 The Betta Homes Agreement Representations were misleading or deceptive, or likely to mislead or deceive, by reason of the Betta Homes Agreement Information. Indeed, the Fantastic Furniture & Betta Homes Announcement was published at a time when the parties were still within a trial period. Contrary to the Betta Homes Agreement Representations, the 18-month term of the Betta Homes Agreement was conditional on Betta Homes "opting in" to the agreement during the trial period and the trial period had not yet commenced. If Betta Homes did not elect to "opt in" (which, as it happens, it never did), this would have prevented the 18-month term from commencing and would have removed any obligation of Betta Homes to use GetSwift exclusively for its last-mile delivery services. Those circumstances contradict the statements made in the Fantastic Furniture & Betta Homes Announcement that GetSwift had signed an exclusive commercial multi-year agreement with Betta Homes.

Betta Homes Quantifiable Benefit Representation

2394 By making the statements in the Fantastic Furniture & Beta Homes Announcement, by not qualifying, withdrawing or correcting the Fantastic Furniture & Beta Homes Announcement following its release, and by making the First Quantifiable Announcements Representation, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the Betta Homes Agreement was secure, quantifiable and measurable in the period from 23 August 2017 until the date of issue of this proceeding (**Betta Homes Quantifiable Benefit Representation**).

[2890] GCS at [807(a)–(c)].

2395 GetSwift again raises the threshold matters and the arguments concerning the Quantifiable Benefit Representations: see [2219]–[2221].[2891] Nevertheless, I accept that the statements were made and were misleading or deceptive. Indeed, the financial benefit could not have been secure, quantifiable or measurable in the light of the Betta Homes Agreement Information (information which, as noted above (at [1547]), was admitted by GetSwift, Mr Hunter and Mr Macdonald),[2892] given that there was a trial period of two months which would not commence until the parties reasonably agree that [GetSwift's] proprietary software platform is operating effectively and available for immediate use by [Betta Homes]", the parties had not yet "reasonably agreed that GetSwift's proprietary software platform [was] operating effectively"; and Betta Homes was required to give notice that they would continue the Betta Homes Agreement during the trial period, otherwise the Betta Homes Agreement would not commence, and it was not obliged to use the GetSwift Platform exclusively.

Betta Homes Financial Benefit Representation

2396 By making the Fantastic Furniture & Betta Homes Announcement, by failing to qualify, withdraw or correct the Fantastic Furniture & Betta Homes Announcement following its release, and by not disclosing the Betta Homes Agreement No Financial Benefit Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations until the date of issue of this proceeding:

(a) any trial period with Betta Homes had been successfully completed;

(b) the Betta Homes Agreement was unconditional;

(c) the Betta Homes Agreement had commenced with a term of two or more years;

(d) Betta Homes had made, and might continue to make, deliveries using the GetSwift Platform;

(e) Betta Homes was continuing to engage with GetSwift;

(f) the statement in the Fantastic Furniture & Betta Homes Announcement namely that GetSwift had "signed an exclusive commercial multi-year agreement" with Betta Homes continued to be true; and

[2891] GCS at [893]–[897].
[2892] Defences at [134].

(g) by reason of the preceding six matters, it was likely that GetSwift would receive a financial benefit from the Betta Homes Agreement

(collectively, the **Betta Homes Financial Benefit Representations**).

2397 GetSwift contends that, because the representations are said to have been made on either 22 September 2017 or 24 January 2018, "that blur indicates the tenuous nature of the representation case".[2893] It says that as at 22 September 2017, nothing had changed from entry into the Betta Homes Agreement and that, as far as GetSwift was concerned, that remained the case as at 24 January 2018.[2894] It draws upon the following summary of what it contends to be the correct position:

(1) for the relationship between GetSwift and Betta Homes to progress, GetSwift's system needed to be integrated with Shippit's system;

(2) Betta Homes retailers were excited to be able to use the GetSwift solution;

(3) in Ms Smith's words the GetSwift integration was "one of the main reasons [Betta Homes] started with Shipppit [*sic*] in the first place";

(4) there was no reason why integration could not occur;

(5) GetSwift had offered to undertake the integration work;

(6) however, Shippit insisted on doing it;

(7) Shippit offered to do so in an "acceptable timeframe";

(8) Ms Smith was somewhat frustrated by the delays and having to chase Shippit;

(9) the last indication as to timeframe from Shippit stretched out to 31 March 2018;

(10) the ball was always in Shippit's court to complete integration;

(11) on 23 January 2018, Shippit apparently unilaterally decided it was not going to pursue integration with GetSwift (although this evidence is subject to a s 136 limitation); and

(12) there is no suggestion that anybody cared to tell GetSwift of Shippit's decision.[2895]

2398 I accept that the position was not clear cut by 22 September 2017, but GetSwift's submission as to 23 January 2018 sits in contrast with Ms Smith's objective evidence (see [684]), which

[2893] GCS at [902].
[2894] GCS at [904].
[2895] GCS at [861].

provides that by 23 January 2018, integration between the GetSwift Platform and the Shippit software system had not occurred; she had not (and she was not aware of anyone else at Betta Homes having) agreed with any representative of GetSwift that GetSwift's platform was operating effectively or that it was available for Betta Homes' use; and Betta Homes was still waiting for GetSwift and Shippit to arrange for integration of their two respective systems from their end. As at 23 January 2018, Betta Homes had not completed (or even started) any trial of the GetSwift Platform; nor had Betta Homes made any deliveries using the GetSwift Platform.[2896] Therefore, by 23 January 2018, I do not accept GetSwift's contentions that nothing had changed. The circumstances had certainly changed to the extent it should have been evident that integration with Shippit would not be occurring, and that Betta Homes would not be proceeding with the trial.

2399 GetSwift submits that, between the release of the Fantastic Furniture & Betta Homes Announcement and 24 January 2018, GetSwift had not said anything about the Betta Homes Agreement. From this, it contends that the case is based on non-disclosure, and could only arise in circumstances where there was a reasonable expectation of disclosure. It contends that any expectation cannot arise because the Betta Homes No Financial Benefit Information was not material.[2897] Relatedly, it says that because this representation amounts to nothing more than silence, any highly specific representations could not have been made, such as that Betta Homes had not successfully trialled the GetSwift Platform.[2898]

2400 As I have noted on many occasions, these representations do not arise by mere silence alone, but by express or implied representations. But in any event, GetSwift had an obligation to make continuous disclosure in respect of the Betta Homes No Financial Benefit Information under s 674 of the *Corporations Act* because this information was material (see [1565]–[1568]) and therefore expected to be disclosed.

Do the representations arise?

2401 It is necessary to set out why I am satisfied that each of the Betta Homes Financial Benefit Representations arises.

[2896] Smith Affidavit (GSW.0009.0009.0001_R) at [44].
[2897] GCS at [902].
[2898] GCS at [903].

2402 *First*, representations (a)–(c) of the Betta Homes Financial Benefit Representations are said to be analogous to representations (a)–(c) of the Betta Homes Agreement Representations. I accept they arise for the same reasons. *Secondly*, representations (d)–(e) of the Betta Homes Financial Benefit Representations arise from the First and Second Agreement After Trial Representations, the Betta Homes Quantifiable Benefit Representation, and the fact that GetSwift did not qualify, withdraw or correct the Betta Homes & Fantastic Furniture Announcement following its release. When this conduct is taken together, ASIC submits that this conduct impliedly represented that Betta Homes was engaging with GetSwift, and made (and continued to make) deliveries using the GetSwift Platform. I accept this to be the case. *Thirdly*, representation (f) of the Betta Homes Financial Benefit Representations is similar to representations (a)–(c) of the Betta Homes Agreement Representations, and they arise because GetSwift did not qualify, withdraw or correct the Fantastic Furniture & Betta Homes Announcement following its release. *Fourthly*, representation (g) of the Betta Homes Financial Benefit Representations arises by reason of the preceding six matters, which represented to the ordinary investor that GetSwift would receive a financial benefit from the Betta Homes Agreement.

2403 GetSwift was obliged to qualify, withdraw or correct the Fantastic Furniture & Betta Homes Announcement because the Betta Homes No Financial Benefit Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the Betta Homes No Financial Benefit Information was materially different from, and inconsistent with, the statements made by GetSwift in the Fantastic Furniture & Betta Homes Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2404 Apart from its overarching contentions described above, GetSwift does not advance specific submissions concerning each element. I am satisfied that each of the Betta Homes Financial Benefit Representations (apart from representation (f), which I will discuss below) was misleading or deceptive by reason of the statements made in the Fantastic Furniture & Betta Homes Announcement, the failure of GetSwift to qualify, withdraw or correct that announcement, the First and Second Agreement After Trial Representations (namely that a proof of concept or trial had been completed before the announcement was published), the

Betta Homes Quantifiable Benefit Representation, the Betta Homes Agreement Information and the Betta Homes No Financial Benefit Information. Indeed, this conduct, taken together, impliedly represented that Betta Homes had made, and might continue to make, deliveries using the GetSwift Platform and that Betta Homes was continuing to engage with GetSwift. However, as Ms Smith's evidence establishes, by 23 January 2018, all communications had ceased between GetSwift and Betta Homes and that she had not had any contact with GetSwift since sending an email to Mr Macdonald on 15 December 2017: see [684]. This is consistent with the evidence of Mr Mitchell, the Chief Marketing Officer at Betta Homes, which I accept, that he had not had any contact with GetSwift since 23 August 2017: see [684]. This evidence as to the true state of affairs was contrary to the Betta Homes Financial Benefit Representations.

2405 However, as to representation (f), GetSwift submits that representation remained true because GetSwift had signed such an agreement. To the extent that ASIC contends that the evidence of Ms Smith and Mr Mitchell establishes that Betta Homes had "ceased engaging with Betta Homes, certainly by 24 January 2018",[2899] I am not convinced, given that, as noted above, the cognate factual circumstance in the continuous disclosure case was abandoned by ASIC: see [1567]. By reason of that matter, and the fact of the Betta Homes Agreement still being place, I am satisfied that representation (f) was not misleading or deceptive because it remained true.

2406 For completeness, I should note that insofar as representations (d) and (g) relate to future matters, I am satisfied that GetSwift did not have reasonable grounds to expect that Betta Homes might make deliveries using the GetSwift Platform in the future. As I found above in respect of the continuous disclosure case, I am satisfied that as at 24 January 2018, GetSwift, and Mr Macdonald, were each aware of the Betta Homes No Financial Benefit Information: see [1560]–[1563]. This included the objective facts that: (a) Betta Homes and GetSwift had not yet agreed that GetSwift's proprietary software platform was operating effectively; (b) Betta Homes had not completed any trial of the GetSwift Platform; and (c) Betta Homes had not made any deliveries using the GetSwift Platform. From these facts, there could be no reasonable grounds for GetSwift to assert that it might continue to make deliveries using the

[2899] ACS at [1856].

GetSwift Platform in the future (even leaving aside the want of evidence as to what was actually relied upon in making the representations).

2407 Finally, I note that while I am satisfied that these representations were misleading, I am not satisfied that Messrs Hunter and Macdonald personally contravened a statutory norm. They had no positive role in making the representation, and the conduct should therefore be seen as GetSwift's.

Conclusion

2408 By failing to disclose the Betta Homes Agreement Information and the Betta Homes No Financial Benefit Information, by reason of their conduct in relation to the First and Second Agreement After Trial Representations, and by contributing to the drafting, approving, authorising and directing the transmission to the ASX of the Fantastic Furniture & Betta Homes Announcement and the April Appendix 4C, GetSwift, and Mr Hunter and Mr Macdonald personally, made the Betta Homes Agreement Representations and the Betta Homes Quantifiable Representation. While GetSwift also made the Betta Homes Financial Benefit Representations, I am not satisfied that Messrs Hunter and Macdonald should be held personally liable. In any event, each of them engaged in conduct contravening s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* (subject to the qualification indicated above).

I.4.12 *Bareburger*

2409 ASIC alleges that the following continuing representations were made in respect of Bareburger: (1) the Bareburger Agreement Representations; (2) the Bareburger Price Sensitivity Representation; and (3) the Bareburger Quantifiable Benefit Representation.

Bareburger Agreement Representations

2410 By making the Bareburger Announcement, by failing to qualify, withdraw or correct the Bareburger Announcement following its release, by making the First and Second Agreement After Trial Representations and by not disclosing the Bareburger Agreement Information, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 30 August 2017 until the date of issue of this proceeding:

(a) any trial period with Bareburger had successfully been completed;

(b) the Bareburger Agreement was unconditional; and

(c) Bareburger had entered into an agreement with GetSwift which:

(i) Bareburger could not terminate for convenience;

(ii) further or alternatively, required Bareburger to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and

(iii) further or alternatively was for a term of two or more years

(collectively, the **Bareburger Agreement Representations**).

Do the representations arise?

2411 GetSwift repeats its threshold points,[2900] and otherwise repeats the same three arguments that I have already described in relation to Fruit Box (see [2228]);[2901] the only difference being that the term of the Bareburger Agreement was said to be 37 months (noting, however, that this does not change the effect of any argument). For reasons I have outlined above (see, e.g., [2371]), GetSwift's submissions should be rejected.

2412 I am satisfied representations (a) and (b) arise by reason of the First and Second Agreement After Trial Representations and from the express statement in the Bareburger Announcement that GetSwift had signed an "exclusive commercial multi-year agreement" with Bareburger. The Bareburger Announcement did not contain any qualifications, nor did it disclose that the parties were in a trial period or that the three-year term of the Bareburger Agreement was conditional on the expiry of a trial period. Taken together with the First and Second Agreement After Trial Representations (by which GetSwift represented that agreements were announced after successful completion of a proof of concept or trial), I am satisfied the statements in the Bareburger Announcement and the fact that the Bareburger Agreement was announced at all conveyed to the ordinary investor that any trial period with Bareburger had been successfully completed and that the Bareburger Agreement was unconditional. Representation (c) arises by reason of the First and Second Agreement After Trial Representations and from the express statement in the Bareburger Announcement that GetSwift had "signed an exclusive multiyear partnership" with Bareburger.

[2900] GCS at [924]–[925].
[2901] GCS at [926(a)–(e)].

2413 GetSwift was obliged to qualify, withdraw or correct the Bareburger Announcement because the Bareburger Agreement Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the Bareburger Agreement Information was materially different from, and inconsistent with, the statements made by GetSwift in the Bareburger Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2414 To the extent that GetSwift's submissions address this issue, its arguments are simply repetitive of previous contentions addressed above.[2902]

2415 I am satisfied that the Bareburger Agreement Representations were misleading or deceptive or likely to mislead or deceive by reason of the Bareburger Agreement Information. The Bareburger Announcement was published at a time when the parties were still within a trial period. Contrary to the Bareburger Agreement Representations, the three-year term of the Bareburger Agreement was conditional on the expiry of the trial period, during which Bareburger was permitted to terminate the agreement. If Bareburger exercised its right to terminate, this would have prevented the three-year term from commencing and would have removed any obligation of Bareburger to use GetSwift exclusively for its last-mile delivery services. Those circumstances contradict statements made in the Bareburger Announcement that GetSwift had signed an exclusive multi-year agreement with Bareburger.

Bareburger Price Sensitivity Representation

2416 By making the Bareburger Announcement, and by requesting the ASX to release the Bareburger Announcement as "price sensitive", ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the Bareburger Agreement was likely to have a material effect on the price or value of GetSwift's shares, or that GetSwift had reasonable grounds for expecting the Bareburger Agreement to have such an effect from 30 August 2017 until the date of issue of this proceeding (together, the **Bareburger Price Sensitivity Representation**). ASIC further submits that to the extent that the Bareburger Price

[2902] GCS at [926(a)–(e)].

Sensitivity Representation was a representation as to a future matter (namely that the representation was likely to have a material effect on the price or value of GetSwift's shares), then by operation of s 12BB(2) of the *ASIC Act* (the "deeming provision"), GetSwift, Mr Hunter and Mr Macdonald did not have reasonable grounds for the making of the representation on the basis that they have not adduced any evidence to the contrary. It says that in these circumstances, the Bareburger Price Sensitivity Representation should be taken to be misleading for the purposes of s 12DA of the *ASIC Act*.

2417 GetSwift accepted that it made the Bareburger Price Sensitivity Representation and that it did not have reasonable grounds to make that representation.[2903] Further, I am satisfied that Mr Hunter and Mr Macdonald had no reasonable grounds for expecting the Bareburger Agreement to have a material effect on either the price or value of GetSwift's shares by reason of the Bareburger Agreement Information, given that the Bareburger Agreement, as varied, contained a trial period which the parties were still within, that the trial period could be terminated before the term of the agreement commenced, and if termination occurred, then the Bareburger Agreement would not commence and Bareburger would not be obliged to use the GetSwift Platform exclusively. The relevance of the "deeming provision" in s 12BB(2) of the *ASIC Act* is of no significance here given GetSwift's admission that it did not have reasonable grounds to make Bareburger Price Sensitivity Representation.

Bareburger Quantifiable Benefit Representation

2418 By submitting the Bareburger Announcement to the ASX, by failing to qualify, withdraw or correct the Bareburger Announcement following its release and by making the First Quantifiable Announcements Representation, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the Bareburger Agreement was secure, quantifiable and measurable (**Bareburger Quantifiable Benefit Representation**).

2419 GetSwift raise similar threshold matters or otherwise repeat arguments concerning the Quantifiable Benefit Representations: see [2219]–[2221].[2904] For the reasons stated above, I

[2903] GCS at [922].
[2904] GCS at [931]–[933], and [935].

reject these submissions. Its only other contention is that GetSwift criticises ASIC's reliance on the fact that integration work was required to be completed by GetSwift, as part of its partnership with Bareburger,[2905] given that it was well known to the market that GetSwift offered a "white label" solution, which required customers to integrate their systems with the GetSwift Platform.[2906]

2420 However, the Bareburger Agreement depended on GetSwift completing certain integration work which was known to Mr Hunter and Mr Macdonald before, or in any event, soon after entering into the Bareburger Agreement: see [690]–[692], [709]–[713]. This fact meant that any financial benefit to GetSwift of the Bareburger Agreement could not have been secure, quantifiable or measurable. This view is fortified by reference to the Bareburger Agreement Information – information which was admitted by GetSwift, Mr Hunter and Mr Macdonald: see [1575]. This information included that the Bareburger Agreement contained a trial period which the parties were still within and that trial period could be terminated before the term of the Bareburger Agreement would commence, meaning that GetSwift would not be obliged to use the GetSwift Platform. In the light of this information, I conclude that the Bareburger Quantifiable Benefit Representation was both made and was misleading or deceptive, or likely to do so.

Conclusion

2421 By failing to disclose the Bareburger Agreement Information, by reason of their conduct in relation to the First and Second Agreement After Trial Representations, and by contributing to the drafting, approving, authorising and directing the transmission to the ASX of the Bareburger Announcement and the April Appendix 4C, including instructing GetSwift's company secretary to mark the Bareburger Announcement as price sensitive (see [706]), GetSwift, and Mr Hunter and Mr Macdonald personally, made the Bareburger Agreement Representations, the Bareburger Price Sensitivity Representation, and the Bareburger Quantifiable Benefit Representation. As a result, I am satisfied that each of them engaged in conduct that was misleading or deceptive.

[2905] GCS at [934].
[2906] Prospectus (GSW.1001.0001.0478) at 0492.

I.4.13 *NA Williams*

2422 ASIC alleges that the following continuing representations were made in respect of NA Williams: (1) the First NAW Agreement Representations; (2) the NAW Quantifiable Benefit Representation; and (3) the Second NAW Agreement Representations.

First NAW Agreement Representations

2423 By making the First NAW Announcement, by failing to qualify, withdraw or correct the Second NAW Announcement following its release, by making the First and Second Agreement After Trial Representations, by making the First Quantifiable Announcements Representations, and by not disclosing the NAW Projection Information, ASIC submits that each of GetSwift and Mr Hunter and Mr Macdonald (personally) impliedly represented the following continuing representations in the period between 12 September 2017 until the date of issue of this proceeding:

(a) any trial period with NA Williams or NAW Clients had been successfully completed;

(b) NA Williams had entered into an agreement with GetSwift which:

(i) NA Williams could not terminate for convenience;

(ii) further or alternatively, required NA Williams to use GetSwift exclusively for its last-mile delivery services for a period of five years;

(iii) further or alternatively, was for a term of five years;

(c) the NAW Agreement could, and would, generate revenue without GetSwift entering into individual agreements with any NAW Clients;

(d) GetSwift had reasonable grounds for making the NAW Transaction Projection; and

(e) further or alternatively to representation (d), GetSwift had reasonable grounds for making the NAW Revenue Projection

(collectively, the **First NAW Agreement Representations**).

Do the representations arise?

2424 GetSwift advances one unique threshold contention: it was apparent from the NAW Announcements that the NAW Agreement was not an agreement with an Enterprise Client, but rather with a company that would represent GetSwift in the North American automotive

aftermarket industry. It says this is important for two reasons: (i) as a threshold matter, even if each of the Agreement After Trial Representations was made, they could not apply because the NAW Agreement was not an agreement with an Enterprise Client; and (ii) it follows from this that representations (a), (b)(ii) and (c) could not have been made.[2907]

2425 It is difficult to accept this submission. Contrary to GetSwift's contentions, it is not clear from any of the NAW Announcements that either NA Williams or the NAW Clients were not Enterprise Clients. On the other hand, the Third NAW Announcement expressly states that NA Williams was a "notable client". That much appears to have been accepted by GetSwift, although it seeks to explain that when this statement is viewed in context, it should be regarded as an "obvious error".[2908] However, the focus is on the recipient. Irrespective of the "obvious error" in the Third NAW Announcement, to my mind, a reasonable hypothetical investor would think that NA Williams was an Enterprise Client. It follows that the Agreement After Trial Representations were made in relation to NA Williams.

2426 Turning to each of the representations, GetSwift contends:

(1) given the NAW Agreement did not contain any trial period, *representation (a)* was not made. [2909]

(2) because the First NAW Agreement Representations arises by silence, ASIC has failed to establish that the hypothetical reasonable investor would have had a reasonable expectation that *representation (b)(i)* would have to be disclosed;[2910] and

(3) as to *representation (c)*, it was implicit from the nature of the agreement described in the NAW Announcements that agreements with NAW Clients would be necessary for GetSwift to generate revenue such that the representation was not made. [2911]

[2907] GCS at [1011]–[1012].
[2908] GCS at [1021(c)].
[2909] GCS at [1012(a)].
[2910] GCS at [1012(b)].
[2911] GCS at [1012(c)].

2427 I note GetSwift does not appear to put into dispute the fact that representations (d) and (e) were made, other than saying that it had reasonable grounds for the representation.[2912] I will return to this argument below: see [2441]–[2448].

2428 These submissions should not be accepted. GetSwift's *first* contention, proceeds incorrectly on the basis that the Agreement After Trial Representations were not made in relation to NA Williams. For the reasons discussed above, they were: see [2425]. As a result, given that the First and Second Agreement After Trial Representations represented that a proof of concept or trial had been completed before the NAW Agreement was entered into, it was represented to the hypothetical investor that NA Williams and the NAW Clients had successfully completed trials before the announcement of the NAW Agreement.[2913]

2429 GetSwift's *second* contention is misconceived not least because I am satisfied that the hypothetical reasonable investor would have expected the fact that NA Williams could terminate the agreement at will to be disclosed, given my findings that the NAW Projection Information was material information: at [1652]–[1655].

2430 *Thirdly*, I do not regard there to be anything implicit in the First and Second NAW Announcements that an agreement with NAW Clients would be necessary to generate revenue. The high point of such this contention is that the announcements list a number of NAW Clients before proceeding to state that "NA Williams and [GetSwift] estimate that *this structure* will potentially yield in excess of 1.15 Billion (1,150,000,000) transactions a year". But that does not reveal that an agreement had to be signed with each of the NAW Clients. Similarly, the Third NAW Announcement does not rise higher than this.

2431 I am satisfied that *representation (a)* arises by reason of the First and Second Agreement After Trial Representation (by which GetSwift represented that a proof of concept or trial had been completed before the NAW Agreement was entered into) and the express statements in the Second NAW Announcement that GetSwift had "signed an exclusive commercial 5 year agreement with N.A. Williams" and that:

> [GetSwift] and N.A. Williams expect to transform the delivery services across the

[2912] GCS at [1013].
[2913] ASIC Reply at [349].

> automotive sector targeting the established national representation under management: AutoZone, NAPA, Advance Auto Parts, Pep Boys, Truckpro, FleetPride, O'Reilly Auto Parts and Traction Heavy Duty among others. N.A. Williams and [GetSwift] estimate that this structure will potentially yield in excess of 1.15 Billion (1,500,000,000) transactions a year when fully implemented.[2914]

2432 The Second NAW Announcement did not disclose that the NAW Agreement did not, and could not, oblige NA Williams or any of the NAW Clients to use GetSwift's services or to make deliveries using the GetSwift Platform; none of the NAW Clients (other than GPC) had trialled or agreed to trial the GetSwift Platform and none of the NAW Clients had entered into any agreement with GetSwift to use the GetSwift Platform. Taken together, I am satisfied that statements in the Second NAW Announcement and the fact that the Second NAW Announcement was announced at all conveyed to the ordinary investor that any trial period with NA Williams or NAW Clients had been successfully completed and that the NAW Agreement was unconditional.

2433 *Representation (b)* arises from the express statement that GetSwift had "signed an exclusive commercial 5 year agreement with NA Williams", together with the First and Second Agreement After Trial Representations and by not disclosing that the NAW Agreement was actually for a term of three years.

2434 *Representation (c)* arises from the First Quantifiable Announcements Representation (by which GetSwift represented that the financial benefit to GetSwift was secure, quantifiable and measurable) and the express statements in the Second NAW Announcement which stated: "The signing the [*sic*] 5 year agreement is expected to significantly increase the company's reoccurring revenues by more than $138,000,000 per year once fully captured" and "N.A. Williams and [GetSwift] estimate that this structure will potentially yield in excess of 1.15 Billion (1,150,000,000) transactions a year when fully implemented. The Company estimates the fulfilment [*sic*] of this vertical will take at least 15-19 months due to the project scope, size and complexity of the channel partners".

2435 *Representations (d) and (e)* arise by reason of the First and Second Agreement After Trial Representations, the fact that GetSwift made very specific projections as to deliveries and transaction value through both the NAW Transaction Projection (1.15 billion) and NAW

[2914] GSWASIC00012627.

Revenue Projection ($138,000,000), and the express statements in the NAW Announcements. I am satisfied that the certainty and confidence conveyed in these statements, and the specificity of the projections referred to in both the NAW Projection and Transaction Projection would have conveyed to an ordinary investor that there were reasonable grounds for making its projections.

2436 I am therefore satisfied that each of the First NAW Agreement Representations arises.

2437 GetSwift was obliged to quantify, withdraw or correct the Second NAW Announcement because the NAW Projection Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the NAW Projection Information was materially different from, and inconsistent with, the statements made by GetSwift in the Second NAW Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuing Disclosure Policy.

Were the representations misleading or deceptive?

2438 *First*, I am satisfied that *representation (a)* – that a trial period had been successfully completed by NA Williams or NAW Clients – was misleading. The evidence establishes that none of the NAW Clients (other than GPC or what is referred to in the announcement by its trading name "NAPA") had trialled or agreed to trial the GetSwift Platform. Even then, GPC made the decision that it would not adopt GetSwift in favour of another platform: see [720]–[721]. This conclusion is fortified by the fact that the NAW Agreement could not oblige NA Williams or any of NAW's clients to enter into any agreement with GetSwift, could not oblige them to use GetSwift's services, or even make deliveries using the GetSwift Platform.

2439 *Secondly*, as to *representation (b)*, on the evidence, NA Williams could terminate with 90 days' notice and the NA Williams Agreement had a term of three years. If NA Williams exercised its right to terminate then NA Williams would have had no obligation to provide sales and marketing services to GetSwift. The right to termination, along with the fact that the NAW Agreement was for a term of three years as opposed to five years, directly contradicted the statements made in the opening paragraph of the Second NAW Announcement that GetSwift had signed an exclusive five-year agreement with NA Williams

2440 *Thirdly*, as to *representation (c)*, the NAW Agreement did not, and could not, oblige NA Williams or any of the NAW Clients to use GetSwift's services, make deliveries to enter into

any agreement. Moreover, NA Williams was not involved in the delivery operations of NAW Clients and it did not know what delivery systems, if any, NAW Clients were using. NA Williams also did not know whether NAW Clients intended to use the GetSwift Platform. For GetSwift to generate any revenue under the NAW Agreement, GetSwift was required to negotiate and enter into a separate agreement with each individual NAW Client either directly or through NA Williams. No such agreements existed as at the date of the Second NAW Williams Announcement. The First and Second NAW Announcements described the NA Williams Clients as "channel partners" even though no such relationship existed between GetSwift and any of the NA Williams Clients, either directly or through NA Williams. For these reasons, I am satisfied that representation (c) was misleading.

2441 *Fourthly*, in respect of *representation (d)*, GetSwift contends that ASIC has not established that GetSwift did not have reasonable grounds for making the NAW Transaction Projection. It draws upon the following evidence to support this assertion:

(1) because the estimate was made by both GetSwift and NA Williams, and it was subsequently "approved" by Mr McCollum, it is said that this is sufficient in itself for GetSwift to have had reasonable grounds for that projection (see [750]–[761]);[2915]

(2) that there is evidence of figures such as 10 per cent or 240 million deliveries, and Mr McCollum was not prepared to dispute that the size of the market might have been as large as 2.4 billion deliveries (see [733]–[735]);[2916]

(3) ASIC mischaracterises Mr Hunter's email on 23 August 2017 (see [756]–[757]) as an admission that the transaction figure came from Mr McCollum, when the evidence indicates that, in actual fact, Mr Hunter was simply referring to how Mr McCollum "approved" the announcement (see [750]–[761]);[2917]

(4) Mr McCollum's evidence that although he could not recall a specific number of deliveries, he did not deny that a number might have been said at the 27 July 2017

[2915] GCS at [1014(a)].
[2916] GCS at [1014(b)].
[2917] GCS at [1014(c)].

meeting (see [733]–[735]), and that Mr White based any number on his experience (see [723], [736]);[2918]

(5) Ms Fox's affidavit affirmed 13 July 2020 explains why Mr White was not called by GetSwift and no adverse inference should be drawn against GetSwift;[2919] and

(6) the ability for NA Williams to sell the GetSwift platform and services to the North American automotive aftermarket was well-founded because of the breadth and depth of the relationship that NA Williams had with its customers, and the skills and experience it would bring to the partnership with GetSwift: see [714]–[718], [740].

2442 But while Mr McCollum reviewed a draft announcement, he did not comment on all parts of it. Indeed, he said that he did not consider "whether 1.15 billion was accurate": see [766].[2920] While I accept that what Mr McCollum considered may not have been communicated to Mr Hunter at the time, in Mr McCollum's response, he stated: "I'm fine with your description of N.A. Williams as written". I do not consider that, from this email, Mr McCollum had approved the figures or that he had conveyed his approval of the figures. Indeed, it goes against common sense to assume that Mr McCollum would fact-check GetSwift's estimates. Further, to the extent GetSwift relies on a 2.4 billion deliveries per year figure, that figure does not appear in any evidence, there is no evidence GPC made 240 million deliveries per year, and that figure did not originate from Mr McCollum. Indeed, while there was certainly "speculation" at the 27 July 2017 meeting as to the market share that GetSwift would obtain, Mr McCollum did not recall the 2.4 billion figure being mentioned: see [735]. Moreover, while he did not deny that a number might have been said, Mr McCollum did not recall hearing a specific number of GPC's annual deliveries at the meeting.[2921] To the extent that Mr McCollum was not prepared to dispute the size might have been 2.4 billion deliveries, that was little more than conjecture. It is not probative of the asserted fact. And in any event, Mr McCollum's evidence was that it would be a great success if GetSwift *could* capture five to ten percent of the *addressable*

[2918] GCS at [1014(d)].
[2919] GCS at [1014(e)]; Affidavit of Michelle Fox affirmed 13 July 2020 (**Fox Affidavit**) (GSW.0009.0046.0001_R).
[2920] ASIC Reply at [350].
[2921] ASIC Reply at [351].

market. That does not provide a reasonable foundation for the NAW Revenue Projection.[2922] To the extent that GetSwift relies on Mr White, the evidence is that Mr White considered GetSwift would obtain 5 million deliveries annually pursuant to the NAW Agreement, which Mr Hunter was aware of: see [736], and [756].[2923] GetSwift appears to have embraced the notion that Mr White had knowledge of GetSwift's delivery numbers.[2924]

2443 Instead, although there was a lack of evidence as to what was, in fact, relied upon, doing the best one can, the NAW Transaction Projection appears to have been based on high level and rough estimates of the total addressable market, it was a "swag or a swing at best", it was a highly speculative figure that was not based on any confirmed data. For instance, the 1.15 billion represented the total addressable market and there was no basis for GetSwift to assume that it could capture the entire market. There does not appear to be any independent information, data or research to quantify any of the deliveries numbers, there is no evidence of GetSwift conducting any real analysis of the market. Indeed, Mr Hunter and Mr Macdonald knew that Advance Auto Parts did 64 million deliveries annually and O'Reilly Auto Parts did 8 million deliveries per month and, given these were two of the largest automotive companies, Mr Hunter and Mr Macdonald must have recognised (or at least should have recognised) that a projection of 1.15 billion could not represent the number of deliveries. These estimates do not appear to fall in the realm of possibility, let alone that of reasonableness.

2444 There is no cogent evidence that establishes the objective truth of the NAW Transaction Projection, or that GetSwift had reasonable grounds for the making of this figure. The origin of any assumption that GPC made 2.4 billion deliveries per year is not clear and the calculation of the NAW Projection Information falls within the peculiar confines of Mr Hunter's knowledge, given that he drafted the First NAW Announcement. Again, Mr Hunter did not explain his reasoning so we have no basis upon which we can judge what was actually on his mind and the material upon which he relied.

2445 As to *representation (e)*, which concerns the NAW Revenue Figure, GetSwift argues that the projection that GetSwift's reoccurring revenue would increase by more than $138,000,000 per

[2922] ASIC Reply at [352].
[2923] ASIC Reply at [353].
[2924] GCS at [953], [992], [1004], and [1014(d)].

year once fully captured, assuming 1.15 billion transactions a year, equates to a charge of 12 cents per delivery. Given the figure of 12 cents per delivery was discussed with Mr McCollum at the meeting on 27 July 2017, ASIC has failed to prove GetSwift did not have reasonable grounds for that projection.[2925]

2446 That submission again proceeds on a mischaracterisation of the totality of the evidence. Mr McCollum's evidence was that GetSwift (specifically, Mr Macdonald) suggested a price between eight and 15 cents for National Accounts (see [729]–[730]), but that he did not agree to this price or any price at the meeting in July 2017 or subsequently and that he did not know what NAW Clients would be willing to pay: [795].

2447 In any event, it is necessary to consider the context as to the NAW Revenue Projection. The projection was based on the NAW Transaction Projection, which is evidenced by the fact that the NAW Revenue Projection was added by Mr Hunter to the Second NAW Announcement because the ASX refused to mark the First NAW Announcement as price sensitive due to the lack of information about projected revenue in the First NAW Announcement. Given this, and the flaws in the NAW Projection Figure, it seems to me that the NAW Revenue Figure would have also had the same flaws. Moreover, in December 2017, GetSwift, Mr Hunter and Mr Macdonald were aware that O'Reilly Auto Parts was undertaking a trial with Elite Extra, who was charging two cents per delivery: see [771]. That is very different to eight cents per delivery.

2448 Again, we do not have direct evidence as to what facts and circumstances *were actually relied* upon, but to the extent such facts can be gleaned from the evidence, there was no reasonable basis for making the NAW Transaction Projection or NAW Revenue Projection, and hence they were misleading or deceptive.

NAW Quantifiable Benefit Representation

2449 By making statements in the Second NAW Announcement, failing to qualify, withdraw or correct the Second NAW Announcement following its release, and by making the First Quantifiable Announcements Representation, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the NAW Agreement was secure, quantifiable and measurable on and from 12

[2925] GCS at [1015].

September 2017 until the date of issue of this proceeding (**NAW Quantifiable Benefit Representation**).

2450 GetSwift contends that GetSwift contends that the NAW Quantifiable Benefit Representation is not established because the First Quantifiable Announcements Representation was not made; however, this argument goes nowhere, given that I have found that the First Quantifiable Announcements Representation was made: see [2182]–[2189]. [2926] Further, GetSwift contends that, to the extent that the NAW Quantifiable Benefit Representation is based on the Second NAW Announcement, it "adds nothing to the reasonable grounds representations forming part of the First NAW Agreement Representations". [2927] However, as I have dismissed the underlying arguments as to why there were reasonable grounds for the projections (see [2441] and [2445]), this submission equally must fail.

2451 I accept that the NAW Quantifiable Benefit Representation was made and was misleading or likely to mislead. This is because the financial benefit could not have been secure, quantifiable or measurable on the basis that the NAW Agreement could not oblige NAW Clients to continue to use GetSwift's services or make deliveries, did not oblige NAW Clients to enter into any agreement with GetSwift, and required GetSwift to negotiate and enter into separate agreements with individual NAW Clients either directly or through NA Williams for GetSwift to generate any revenue.

Second NAW Agreement Representations

2452 By submitting the Second NAW Announcement to the ASX for release, by failing to qualify, withdraw or correct the Second NAW Announcement following its release, by making the Third NAW Announcement, and by not disclosing the NAW Projection Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 31 October 2017 until the date of issue of this proceeding:

(a) a repetition of the First NAW Agreement Representations;

[2926] GCS at [1017].
[2927] GCS at [1018].

(b) NA Williams was a client of GetSwift and not an agent or representative of GetSwift or an agent or representative for another party;

(c) GetSwift could, and would, provide NA Williams with access to the GetSwift Platform pursuant to the NAW Agreement;

(d) NA Williams could, and would, itself use the GetSwift Platform under the NAW Agreement;

(e) the NAW Agreement could, and would, generate revenue without GetSwift entering into individual agreements with each NAW Client; and

(f) that the statements in the Second NAW Announcement, specifically "[GetSwift] has signed an exclusive commercial 5 year agreement with N.A. Williams…the leading representative group for the North American Automotive Sector", the NAW Transaction Projection and the NAW Revenue Projection, continued to be true

(collectively, the **Second NAW Agreement Representations**).

How the representations arise

2453 GetSwift's arguments concerning the Second NAW Agreement Representations are simply a reprise of its previous contentions (at [2424]–[2448]), and I will not address them again.[2928]

2454 *First*, representation (a) arises by the combination of submitting the Second NAW Announcement, by not qualifying, withdrawing or correcting the Second NAW Announcement, and by making the Third NAW Announcement, which repeated aspects of the Second NAW Announcement. *Secondly*, representation (b) to (d) arise by reason of GetSwift's express words in the Third NAW Announcement, including "additional global client onboarding is underway to utilise GetSwift's SaaS solution to optimise delivery logistics", "a notable client signed for the September quarter was N.A. Williams with a new vertical segment (North American Automotive Industry) poised to deliver more than 1 billion transactions per year when fully implemented" and "under the exclusive 5-year contract with NA Williams, the GetSwift platform will expand into a new automotive vertical". *Thirdly*, representation (e) arises by reason of the express words in the Third NAW Announcement, together with the

[2928] GCS at [1021(a)–(c)].

NAW Revenue Projection and the NAW Transaction Projection from the Second NAW Announcement. *Fourthly*, representation (f) arises because the Third NAW Announcement failed to qualify, withdraw or correct the Second NAW Announcement; that is, it simply continued to reinforce or embrace the statements made in that announcement.

2455 GetSwift was obliged to qualify, withdraw or correct the Second NAW Announcement and the Third NAW Announcement because the NAW Projection Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the NAW Projection Information was materially different from, and inconsistent with, the statements made by GetSwift in the Second NAW Announcement and the Third NAW Announcements; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuing Disclosure Policy.

Were the representations misleading or deceptive?

2456 In the absence of any submissions on this issue, I set out below, in brief, why I am satisfied the Second NAW Agreement Representations were misleading or deceptive, arise by reason of the statements made in the Second NAW Announcement to the ASX for release, by failing to qualify, withdraw or correct the Second NAW Announcement following its release, by making the Third NAW Announcement and by not disclosing the NAW Projection Information.

2457 *First*, representations (a), (e) and (f) were misleading for the reasons that I explained in respect of the First NAW Agreement Representations: see [2438]–[2448]. *Secondly*, representations (b)–(d) were misleading or deceptive because NA Williams was not a client, but simply provided sales and marketing services to GetSwift under the NAW Agreement, and because NA Williams did not undertake deliveries itself but was simply a representative body that did not use the GetSwift Platform itself. *Thirdly*, representation (e) was misleading or deceptive because GetSwift was required to negotiate and enter into separate agreements with each individual NAW Client either directly or through NA Williams to generate revenue under the NAW Agreement. I note for completeness that to the extent representations (c), (d) and (e) relate to future matters, for the same reasons I have outlined above, I am satisfied GetSwift did not have reasonable grounds to expect that GetSwift "would" provide NA Williams with access to the GetSwift Platform, that NA Williams "would" itself use the GetSwift Platform, and the NAW Agreement "would" generate revenue without GetSwift entering into individual agreements with each NAW Client.

Conclusion

2458 By failing to disclose the NAW Projection Information, by reason of their conduct in relation to the First and Second Agreement After Trial Representations, and by contributing to the drafting, approving, authorising and directing the transmission to the ASX of the Second NAW Announcement, the Third NAW Announcement and the April Appendix 4C, GetSwift, and Mr Hunter and Mr Macdonald personally, made the First NAW Agreement Representations, the NAW Quantifiable Benefit Representations and the Second NAW Agreement Representations. As a result, I am satisfied that each of them engaged in conduct contravening s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

I.4.14 *Johnny Rockets*

2459 ASIC alleges that the following continuing representations were made in respect of Johnny Rockets: (1) the Johnny Rockets Agreement Representations; (2) the Johnny Rockets Price Sensitivity Representation; (3) the Johnny Rockets Quantifiable Benefit Representation; and (4) the Johnny Rockets No Termination Representations.

Johnny Rockets Agreement Representations

2460 By submitting the Johnny Rockets Announcements to the ASX, by failing to qualify, withdraw or correct the Johnny Rockets Announcement following its release, by making the First and Second Agreement After Trial Representations, by making the First Quantifiable Announcements Representations and by not disclosing the Jonny Rockets Agreement Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations in the period between 25 October 2017 until the date of issue of this proceeding:

(a) any trial period with Johnny Rockets had been successfully completed;

(b) the Johnny Rockets Agreement was unconditional;

(c) the Johnny Rockets Agreement had commenced with a term of two or more years; and

(d) Johnny Rockets had entered into an agreement with GetSwift which:

  (i) Johnny Rockets could not terminate for convenience;

  (ii) further or alternatively, required Johnny Rockets to use GetSwift exclusively for its last-mile delivery services for a period of two or more years; and

(iii) further or alternatively, was for a term of two or more years; and

(e) that GetSwift had reasonable grounds for making the Johnny Rockets Projection

(collectively, the **Johnny Rockets Agreement Representations**).

2461 As to representation (e), GetSwift contends (presumably more in hope than expectation) that ASIC abandoned its case in relation to this representation, which was described at 4FASOC (at [205(b)]) as "[t]he Company's indicative estimates are for a transaction yield in excess of millions of deliveries per year upon complete adoption and utilization". GetSwift says this occurred because this representation is not addressed at all in ASIC's closing submissions.[2929] However, if there is one thing clear about the way ASIC approached this case, it did not abandon anything, no matter how peripheral. It appears that there may have been some typographical error in ASIC's closing submissions because the fifth alleged representation is combined with representation (d)(iii), which has resulted in ASIC failing to address this point directly.[2930]

2462 Nonetheless, as ASIC unsurprisingly clarified in reply, ASIC contends that GetSwift did not have reasonable grounds for making the Johnny Rockets Projection. This was in circumstances where: Johnny Rockets had told GetSwift that it only made "800-900 delivery orders a day" (see [804]); had "a monthly average of 20-25k transaction [sic]" and only 7 of the 10 branches participated in delivery (see [807]); and the term sheet stated that only 2 stores would be used in the trial: see [814]. According to the information provided by Johnny Rockets, the maximum deliveries that Johnny Rockets undertook per year could only be 328,500 deliveries; that is 900 deliveries per day multiplied by 365 days. This, it is said, is substantially less than the estimated "transaction yield in excess of *millions* of deliveries per year upon complete adoption and utilization" (emphasis added).

[2929] GCS at [1077]–[1078].
[2930] See GCS [1916(d)(iii)] ("further or alternatively, was for a term of two or more years *and that GSW had reasonable grounds for making the Johnny Rockets Projection*" (emphasis added)).

Do the representations arise

2463 GetSwift repeats its threshold points,[2931] and otherwise repeats similar arguments I have already dealt with above (see, e.g., [2292]–[2297]), including its arguments concerning the disclosure of a trial period,[2932] its argument about the word "unconditional",[2933] its contention that the agreement was not "material" information,[2934] its argument concerning the word "commencement" or the term of the agreement,[2935] and its Perpetually on Trial and Terminable at Will Contention.[2936]

2464 It appears that GetSwift's only unique argument relates to representation (a). GetSwift argues that ASIC has ignored how the Johnny Rockets Agreement referred to a "Limited Roll Out Period" as opposed to a trial. It says that the hypothetical reasonable investor would not have expected GetSwift to announce the completion of a trial period that was not required under the terms of the Johnny Rockets Agreement.[2937]

2465 This argument is of no moment. While the Johnny Rockets Agreement did utilise the term "Limited Roll Out Period" as opposed to "Free Trial Period", there is no dissimilarity between these terms in the context of the Johnny Rockets Agreement. This is best evidenced by comparing the APT Agreement with the Johnny Rockets Agreement. Under the APT Agreement, the "Free Trial Period" was for one month, during which APT could, with at least seven days prior to the expiration of that period, terminate the APT Agreement.[2938] Under the Johnny Rockets Agreement, the "Limited Roll Out Period" provided Johnny Rockets with one-month free use of the Platform, during which Johnny Rockets could, with at least seven days prior to the expiration of that period, terminate the Johnny Rockets Agreement.[2939] What this analysis demonstrates is that there was no material difference between the use of "Limited Roll Out Period" in the context of the Johnny Rockets Agreement and the use of a "Free Trial Period" in other agreements, such as the APT Agreement. Why GetSwift would adopt a

[2931] GCS at [1066]–[1067].
[2932] GCS at [1068].
[2933] GCS at [1070].
[2934] GCS at [1071].
[2935] GCS at [1072].
[2936] GCS at [1073]–[1076].
[2937] GCS at [1069].
[2938] GSW.0022.0003.0025.
[2939] Johnny Rockets Agreement (GSWASIC00006520).

difference in terminology is unclear. In the light of this finding, the analysis proceeds on a similar basis as in respect to previous Enterprise Clients. I am satisfied that the hypothetical reasonable investor would have expected GetSwift to announce the completion of a trial period on the basis that I have found that the Johnny Rockets Agreement Information (which referred to a "limited roll out period") was material within the meaning of s 674 of the *Corporations Act*: at [1668]–[1670].

2466 Having disposed of this contention, I now set out why am satisfied the Johnny Rockets Agreement Representations were made.

2467 *First*, I am satisfied that representations (a) and (b) arise by reason of the First and Second Agreement After Trial Representations and from the express statement in the Johnny Rockets Announcement that GetSwift had signed "an exclusive multi-year agreement" with Johnny Rockets. The Johnny Rockets Announcement did not contain any qualifications, nor did it disclose that the three-year term of the Johnny Rockets Agreement was conditional on the expiry of a "limited roll out" period. Taken together with the First and Second Agreement After Trial Representations, by which GetSwift represented that agreements were announced after successful completion of a proof of concept or trial, the statements in the Johnny Rockets Announcement and the fact of the Johnny Rockets Agreement having been announced at all conveyed to the ordinary investor that any trial period with Johnny Rockets had been successfully completed and that the Johnny Rockets Agreement was unconditional. *Secondly*, representation (c) arises by reason of the statement that a "multi-year" agreement had been signed by GetSwift, indicating the term of the Johnny Rockets Agreement was for a period of two or more years. *Thirdly*, representation (d) arises by reason of the First and Second Agreement After Trial Representations and from the express statement in the Johnny Rockets Announcement that GetSwift had "signed an exclusive commercial multi-year agreement" with Johnny Rockets.

2468 GetSwift was obliged to qualify, withdraw or correct the Johnny Rockets Announcement because the Johnny Rockets Agreement Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances because: (i) the Johnny Rockets Agreement Information was materially different from, and inconsistent with, the statements made by GetSwift in the Johnny Rockets Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuous Disclosure Policy.

Were the representations misleading or deceptive?

2469 As to whether these representations were misleading or deceptive, or likely to mislead or deceive, to the extent that GetSwift's submissions address this issue, its arguments are simply repetitive, and do not take the matter further:(see, e.g., [2300]–[2301].[2940]

2470 Indeed, I am satisfied that the Johnny Rockets Agreement Representations were misleading or deceptive, or likely to mislead or deceive, by reason of the First and Second Agreement After Trial Representations (namely that a proof of concept or trial had been completed before the Johnny Rockets was entered into and announced) and by reason of the Johnny Rockets Agreement Information. The Johnny Rockets Announcement was published at a time when the parties were still within the "limited roll out" (or trial period) and Johnny Rockets had a contractual right to terminate. At the time of the announcement, it was known to GetSwift, Mr Hunter and Mr Macdonald that if Johnny Rockets exercised its right to terminate (which it ultimately did), this would prevent the three-year term from commencing, thereby removing any obligation of Johnny Rockets to use GetSwift exclusively for its last-mile delivery services. This contradicts the statements made in Johnny Rockets Announcement that GetSwift had signed an exclusive multi-year agreement with Johnny Rockets.

2471 Finally, by reason of the matters discussed at the outset above (at [2461]–[2462]), I am satisfied that representation (e) was misleading or deceptive, given there were no reasonable grounds for the Johnny Rockets Projection: as defined at [2461].

Johnny Rockets Price Sensitivity Representation

2472 By making the statements in the Johnny Rockets Announcement, and by requesting that the ASX release the Johnny Rockets Announcement as "price sensitive", ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the Johnny Rockets Agreement was likely to have a material effect on the price or value of GetSwift's shares, or that GetSwift had reasonable grounds for expecting the Johnny Rockets Agreement to have such an effect (together, the **Johnny Rockets Price Sensitivity Representation**).

2473 ASIC further submits that to the extent that the Johnny Rockets Price Sensitivity Representation was a representation as to a future matter (namely that the representation was

[2940] GCS at [1068]–[1076].

likely to have a material effect on the price or value of GetSwift's shares), then by operation of s 12BB(2) of the ASIC, GetSwift, Mr Hunter and Mr Macdonald did not have reasonable grounds for the making of the representation on the basis that they have not adduced any evidence to the contrary. It says that in these circumstances, the Johnny Rockets Price Sensitivity Representation should be taken to be misleading for the purposes of s 12DA of the *ASIC Act*.

2474 GetSwift accepted that it made the Johnny Rockets Price Sensitivity Representation and that it did not have reasonable grounds to make that representation.[2941] In any case, and for completeness, irrespective of any effect that the Johnny Rockets Announcement itself had on GetSwift's share price, if disclosure of the Johnny Rockets Agreement had included the Johnny Rockets Agreement Information, its disclosure would not have been likely to have a material effect on either the price or value of GetSwift's shares, particularly because the parties were still within a "limited roll out" (or trial) period during which Johnny Rockets could terminate the agreement, in which case the "multi-year" term, as announced, would not commence. Further, I am satisfied that GetSwift, Mr Hunter and Mr Macdonald had no reasonable grounds for expecting the Johnny Rockets Agreement to have a material effect on either the price or value of GetSwift's shares by reason of the Johnny Rockets Agreement Information, given that the Johnny Rockets Agreement contained a "limited roll out period" which had not commenced, that the "limited roll out period" could be terminated before the term of the agreement commenced, and if termination occurred, then the Johnny Rockets Agreement would not commence and Johnny Rockets would not be obliged to use the GetSwift Platform.

Johnny Rockets Quantifiable Benefit Representation

2475 By submitting the Johnny Rockets Announcement to the ASX, by failing to qualify, withdraw or correct the Johnny Rockets Announcement following its release and by making the Johnny Rockets Announcements Representation, ASIC submits that each of GetSwift and Mr Hunter and Mr Macdonald (personally) impliedly represented that the financial benefit to GetSwift

[2941] GCS at [1060].

from the Johnny Rockets Agreement was secure, quantifiable and measurable (**Johnny Rockets Quantifiable Benefit Representation**).

2476 GetSwift raise similar threshold matters or otherwise repeats the same formulaic arguments concerning the Quantifiable Benefit Representations (see [2219]–[2221]),[2942] which I have dealt with.

2477 The Johnny Rockets Quantifiable Benefit Representation was made and that it was misleading or deceptive, or likely to mislead or deceive. The financial benefit could not have been secure, quantifiable or measurable by reason of the Johnny Rockets Agreement Information, including the fact that the Johnny Rockets Agreement contained a "limited roll out period" which had not commenced, that the "limited roll out period" could be terminated, and if terminated, the Johnny Rockets Agreement would not commence and Johnny Rockets would not be obliged to use the GetSwift Platform exclusively.

Johnny Rockets No Termination Representations

2478 By making the statements in the Jonny Rockets Announcement, by not qualifying, withdrawing or correcting the Johnny Rockets Announcement following its release, and by not disclosing the Johnny Rockets Termination Information, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following representations from the period on and from 9 January 2018 until the date of issue of this proceeding:

(a) the Johnny Rockets Agreement had not been terminated;

(b) GetSwift continued to have an agreement with Johnny Rockets which required Johnny Rockets to use GetSwift exclusively for its last-mile delivery services; and

(c) the statement in the Johnny Rockets Announcement that GetSwift had signed an exclusive multi-year agreement with Johnny Rockets continued to be true

(collectively, the **Johnny Rockets No Termination Representations**).

2479 GetSwift's only contentions are that:

[2942] GCS at [1080]–[1081].

(1) ASIC has failed to prove its claims in relation to the Johnny Rockets Termination Information;[2943]

(2) the hypothetical reasonable investor would only have expected GetSwift to announce that the agreement had been terminated if it were material (which it is not);[2944] and

(3) representation (b) could not reasonably have been conveyed in any event, by reason of a variation of its Perpetually on Trial and Terminable at Will Contention.[2945]

2480 None of these arguments, for reasons that I have already provided, advance GetSwift's defence in respect of the Johnny Rockets No Termination Representations further.

2481 I am satisfied that the Johnny Rockets No Termination Representations were misleading or deceptive, or likely to mislead or deceive, by reason of the Johnny Rockets Termination Information and the unequivocal nature of Johnny Rocket's email to GetSwift on 9 January 2018 stating: "Unfortunately, we will not be able to move forward because of the costs associated with the interface. I sincerely apologize for the inconvenience and wasting of your time": see [831]. I am not satisfied, however, that the Johnny Rockets No Termination Representations was personally made by either Messrs Hunter or Macdonald. They were simply aware of the omitted information; there was no positive act on their behalf.

Conclusion

2482 By failing to disclose the Johnny Rockets Agreement Information and Johnny Rockets Termination Information, by reason of their conduct in relation to the First and Second Agreement After Trial Representations and the First Quantifiable Announcements Representation, and by contributing to the drafting, approving, authorising and directing the transmission to the ASX of the Johnny Rockets Announcement and the April Appendix 4C, including instructing GetSwift's company secretary to mark the Johnny Rockets Announcement as price sensitive (see [822]), GetSwift, and Mr Hunter and Mr Macdonald personally, made the Johnny Rockets Agreement Representations, the Johnny Rockets Price Sensitivity Representation, the Johnny Rockets Quantifiable Benefit Representation. I have found only GetSwift made the Johnny Rockets No Termination Representations. As a result,

[2943] GCS at [1085].
[2944] GCS at [1086].
[2945] GCS at [1088].

subject to the latter qualification, each of them engaged in conduct contravening s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

I.4.15 *Yum*

2483 ASIC alleges that the following continuing representations were made in respect of Yum: (1) the Yum MSA Representations; (2) the Yum Price Sensitivity Representation; and (3) the Yum Quantifiable Benefit Representation.

Yum MSA Representations

2484 By making the Yum Announcement, by failing to qualify, withdraw or correct the Yum Announcement following its release, by making the First and Second Agreement After Trial Representations, by making the First, Second and Third Quantifiable Announcements Representations, and by not disclosing the Yum MSA Information, the Yum Projection Information and the additional information described below (at [2485]), ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented the following continuing representations on and from 1 December 2017 until the date of issue of this proceeding:

(a) any trial period or limited roll out with Yum had been successfully completed;

(b) Yum had entered into an agreement with GetSwift which:

(i) Yum was not permitted to terminate for convenience;

(ii) further or alternatively, required Yum to use GetSwift exclusively for its last-mile delivery services for a period of two or more years;

(iii) further or alternatively, was for a term of two or more years;

(iv) further or alternatively, allowed GetSwift to provide its services to Yum and Yum Affiliates immediately;

(c) GetSwift had reasonable grounds for making the Yum Deliveries Projection; and

(d) GetSwift had reasonable grounds for making the Yum Rollout Projection

(collectively, the **Yum MSA Representations**).

2485 As noted above, ASIC submits that the Yum MSA Representations also arise by reason of GetSwift's failure to disclose the following: (a) Yum was considering adopting the GetSwift platform for its Pizza Hut International franchise only (which excluded Pizza Hut in the United

States and China); (b) Yum had not determined that the GetSwift Platform would be rolled out to 20 countries; (c) Yum had not told GetSwift that it was considering "broader deployment" of the GetSwift Platform beyond its top 20 markets; (d) Yum had not given GetSwift any information about whether the GetSwift Platform may be promoted to or adopted by, its other affiliates Taco Bell, KFC and WingStreet.[2946]

2486 GetSwift contends that none of the alleged facts at [2485] is maintainable in the light of Mr Sinha's evidence. GetSwift draw upon the fact that: (a) when Yum entered into the Yum MSA, Yum had intended that, so long as the pilot tests were successful, the GetSwift Platform would be rolled out to at least Pizza Hut International's top 20 markets and beyond; and (b) how Mr Sinha understood that GetSwift's objective was to become the exclusive supplier of delivery tracking and logistics software across all of Yum's brands globally. It is said that Mr Sinha told GetSwift it should be able to achieve its goal to become the exclusive supplier of delivery tracking and logistics software across all of Yum's brands globally once it was endorsed by Yum's corporate headquarters: see [875]–[879].[2947]

2487 This submission is a mischaracterisation of Mr Sinha's evidence. As Mr Sinha made clear, discussions between himself and GetSwift only related to Pizza Hut International but did not include Pizza Hut US or Pizza Hut China: see [842]. Moreover, while Mr Sinha told Messrs Hunter and Macdonald that his objective was to conduct pilots in two test markets in order to assess whether the GetSwift Platform was suitable for further roll-out, and that if the pilot tests were successfully completed, GetSwift's product could *potentially* be deployed to Pizza Hut International's top 20 markets (see [840]); this does not establish Yum had determined the GetSwift Platform *would* be rolled out to 20 countries. Nor does it demonstrate Yum was considering "broader deployment" of the GetSwift Platform beyond its top 20 markets. Instead, Mr Sinha's evidence reveals that only two pilot tests were to be conducted at the time of the Yum Announcement (which had not been determined as of 1 December 2017): see [920]. In any event, a possible deployment of 20 countries was, at a minimum, conditional upon successful completion of these pilot tests and GetSwift was simply a potential vendor at this time: see [921]. Finally, as Mr Sinha explained, the other Yum companies such as KFC and

[2946] 4FASOC at [239(dd)].
[2947] GCS at [1194].

Taco Bell were not within the scope of the fleet management services sought from GetSwift: see [842]. This brief analysis, in addition to the findings I have already made in above, reveals the strained and selective way that GetSwift draws upon Mr Sinha's evidence, and for these reasons, I am satisfied the matters (at [2485]) are maintainable by ASIC, from which the Yum MSA Representations arise.

Do the representations arise?

2488 Other than repeating its threshold points,[2948] GetSwift accepts that representations (c) and (d) were made but otherwise disputes that ASIC has not discharged its onus of proving that GetSwift lacked reasonable grounds for making that representation.[2949] I will return to this issue below at [2500]. Otherwise, GetSwift submits that:

(1) *Representation (a)* was not made because the Yum Announcement referred to how a limited roll out was to occur (rather than had been completed), and because it referred to "initial deployments" commencing in the Middle East and Asia Pacific "with more than 20 countries to be rolled out in the first and second phase". It repeats its argument that, adopting the test of materiality, a hypothetical reasonable investor would not have expected information about a trial period or limited roll out period would be disclosed.[2950]

(2) As to *representation (b)*, in particular representations (b)(i)–(iii), GetSwift repeats variations of its Perpetually on Trial and Terminable at Will Contention,[2951] contending that any representation that the Yum MSA was "multi-year" was true on the basis that the Yum MSA had an unlimited term and so would continue indefinitely, and "certainly beyond 12 months" unless one of the parties terminated it.[2952] Further, GetSwift contends that there is no textual basis for representation (b)(iv) – that the MSA "allowed GetSwift to provide its services to *Yum and Yum Affiliates immediately*" – because the announcement referred to a rollout taking place "in the first and second phase". Finally, it is said that a hypothetical reasonable investor would not have expected GetSwift to

[2948] GCS at [1195]–[1197].
[2949] GCS at [1204], [1206].
[2950] GCS at [1198].
[2951] GCS at [1199]–[1201].
[2952] GCS at [1202].

disclose the fact that it was required to execute SOWs with individual franchisees in order to commence processing deliveries.[2953]

2489 GetSwift's submissions in respect of representation (a) are of some significance. While I accept that the statement in Yum Announcement that a limited roll out "will commence" must be viewed in the context of the First and Second Agreement After Trial Representations (that agreements were announced *after* successful completion of proof of concept), the First, Second and Third Quantifiable Announcements Representations (that announcements would *only* be made when the financial benefits were secure, quantifiable and measurable) and the express statements in the Yum Announcement, I am not satisfied that the hypothetical investor would have deduced that a trial had been conducted. Indeed, the following emphasised portions of the Yum Announcement are clearly drafted to reference the future occurrence of "initial deployments" and "rollout":

> The Company estimates that more than 250,000,000 deliveries annually **will benefit** from its platform as a result of this partnership after implementation. **Initial deployments will commence** in the Middle East, and Asia Pac, with more than 20 countries **slated to be rolled out** in the first and second phase, followed by a broader deployment thereafter. The company will be **focused on concurrent multi regional rollouts** to speed up global coverage.
>
> (Emphasis added).

2490 I have therefore not reached the level of satisfaction to conclude representation (a) was made.

2491 The same is not the case with respect to GetSwift's contentions in respect to representation (b). Fundamentally, the Yum Announcement did not depict accurately that the Yum MSA was in fact an MSA, not an agreement with Yum. More specifically, GetSwift's contentions in regards to (b)(i)–(iii) are simply repetitions of previous arguments and do not take its case further. In saying this, I do accept that representation (b)(iv) is somewhat of a stretch, given Yum stated implementation and rollout had to occur, and that there would be a staged rollout.

2492 Representation (b) (excluding (b)(iv)) arises by reason of the First and Second Agreement After Trial Representations, together with a number of statements in the Yum Announcement, including:

[2953] GCS at [1203].

> [GetSwift] had signed [a] global multiyear partnership with Yum! Brands.
>
> …The unique partnership will provide Yum the use of the best in class logistics platform in order to continue improving the customer experience, reduce operational inefficiencies and expand market share.
>
> …The Company estimates that more than 250,000,000 deliveries annually will benefit from its platform as a result of this partnership after implementation.

2493 Indeed, the Yum Announcement did not contain qualifications that the Yum MSA did not have a fixed term, that termination could occur for any or no reason by giving 30 days' notice, and that Yum or Yum Affiliates were not obliged to issue a statement of work, use the services or make deliveries using GetSwift's platform. It also did not disclose any of the Yum Projection Information.

2494 I am also satisfied representations (c) and (d) arise by reason of the First and Second Agreement After Trial Representations, the First, Second and Third Quantifiable Announcements Representation and GetSwift having made the express statement in the Yum Announcement that: "The Company estimates that more than 250,000,000 deliveries annually will benefit from its platform as a result of the partnership after implementation" (the Yum Deliveries Projection) or "initial deployment will commence in the Middle East and Asia Pacific, with more than 20 countries slated to be rolled out in the first and second phase, followed by a broader deployment thereafter" (the Yum Rollout Projection), together with the statements:

> Yum operates the brands of Taco Bell, KFC, Pizza Hut and WingStreet worldwide…
>
> in order to compete aggressively in this market Yum has partnered with GSW to provide its retail stores globally the ability to compete with their global counterparts when it comes to deliveries and logistics…
>
> …initial deployment will commence in the Middle East and Asia Pacific, with more than 20 countries slated to be rolled out in the first and second phase, followed by a broader deployment thereafter

2495 The certainty conveyed in the above statements, and the specificity of the projections referred to in the Yum Deliveries Projection would have conveyed to an ordinary investor that GetSwift had reasonable grounds for making the Yum Deliveries Projection.

2496 I am therefore satisfied that each of the Yum MSA Representations (excluding representation (a) and (b)(vi)) was made.

2497 GetSwift was obliged to quantify, withdraw or correct the Yum Announcement because the Yum MSA Information and the Yum Projection Information was information that the market and potential investors expected or were reasonably entitled to expect to be released to them in

all the circumstances because: (i) the Yum MSA Information and the Yum Projection Information was materially different from, and inconsistent with, the statements made by GetSwift in the Yum Announcement; and (ii) the statements made by GetSwift in relation to its intended approach to continuous disclosure as set out in the Prospectus and its Continuing Disclosure Policy.

Were the representations misleading or deceptive?

2498 Beyond stating what has already been stated,[2954] I will address each representation in turn (excluding those which were not made).

2499 *First*, I am satisfied that representation (b) (excluding (b)(iv)) was misleading or deceptive, or likely to mislead or deceive because the Yum MSA allowed Yum and Yum Affiliates to terminate for any or no reason by giving 30 days' notice; the Yum MSA did not have a fixed term; no statement of work had been issued under the Yum MSA; the Yum MSA did not oblige Yum or Yum Affiliate to issue any statement of work, to use GetSwift's services or make deliveries using the GetSwift Platform or to enter into any agreement with GetSwift. Therefore, to the extent that GetSwift contends that the Yum MSA would "continue indefinitely" or "certainly beyond 12 months", that proposition must be rejected.

2500 *Secondly*, GetSwift contends that ASIC has not discharged its onus of providing that GetSwift lacked reasonable grounds for making representation (c).[2955] I disagree. Volumes of submissions were advanced on this point,[2956] but to my mind the answer is simple: the Yum Deliveries Projection was included in a price sensitive announcement to be published by the ASX to the market at a point in time when GetSwift had not conducted a trial, not made a single delivery and not entered into a single Statement of Work. There is also no justification for the figure provided.

2501 *Thirdly*, mirroring its argument that I have already set out above (at [2486]), GetSwift contends that ASIC has failed to establish GetSwift did not have reasonable grounds for the Yum Rollout Projection, given that, by entering into the MSA, the parties intended and expected that once

[2954] GCS at [1198]–[1203].
[2955] GCS at [1205(a)–(m)].
[2956] GCS at [1205(a)–(m)].

GetSwift had been endorsed as the preferred supplier across all of Yum's brands, and after testing had been completed in two markets located in the Asia Pacific and Middle East/north African regions, the GetSwift platform would be rolled out across Pizza Hut International's top 20 markets and beyond.[2957] I am unconvinced. While GetSwift might have intended the GetSwift Platform would be rolled out across Pizza Hut's International top 20 markets and beyond, as I explained at [2487], Mr Sinha's evidence makes it clear that Pizza Hut International had not discussed or agreed with GetSwift to deploy the GetSwift product to 20 countries with GetSwift and only two pilot tests were to be conducted at this stage (which had not been determined as of 1 December 2017): see [920]. Moreover, Mr Sinha made it pellucid that he could not guarantee exclusivity: see [878]. In the light of this evidence, together with the Yum MSA Information and Yum Projection Information, I am satisfied GetSwift had no reasonable grounds for making the Yum Rollout Projection.

Yum Price Sensitivity Representation

2502 By making the Yum Announcement, and by requesting that the ASX release the Yum Announcement as "price sensitive", ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the Yum MSA was likely to have a material effect on the price or value of GetSwift's shares, or that GetSwift had reasonable grounds for expecting the Yum MSA to have such an effect on and from 1 December 2017 until the date of issue of this proceeding (together, the **Yum Price Sensitivity Representations**). ASIC further submits that to the extent the Yum Price Sensitivity Representations was a representation as to a future matter (namely that the representation was likely to have a material effect on the price or value of GetSwift's shares), then GetSwift, and Mr Hunter and Mr Macdonald personally, did not have reasonable grounds for the making of the representation on the basis that they have not adduced any evidence to the contrary. It says that in these circumstances, the Yum Price Sensitivity Representations should be taken to be misleading for the purposes of s 12DA of the *ASIC Act*.

2503 GetSwift denies the Yum Price Sensitivity Representations were misleading for much the same reasons that I have canvassed above (at [2486]), namely, that: (a) Mr Sinha conveyed to GetSwift that by signing the MSA and accepting endorsement as Yum's preferred supplier,

[2957] GCS at [1206].

GetSwift should "achieve all [its] goals" of becoming the exclusive supplier across Yum's brands globally, and that in relation to Pizza Hut International alone; and (b) Mr Sinha estimated that stores in the top 20 markets carried out approximately 800 to 1,000 transactions per store per week (see [845], [849]), which it says was a "very significant commercial opportunity".[2958] GetSwift also contends that ASIC has failed to establish the Yum MSA Information existed or that it was material, and as such, ASIC's reliance on the Yum MSA Information must fail.[2959]

2504 These submissions miss the point. On the evidence, while Mr Sinha accepted he had conveyed to GetSwift that "they should be able to achieve [the] goal of being the exclusive supplier to Pizza Hut International franchisees, if there was a successful trial",[2960] and understood Mr Hunter was requesting GetSwift be endorsed across all Pizza Hut International as the preferred supplier, he was resolute that Pizza Hut International could not guarantee exclusivity. This was confirmed during cross-examination, in which Mr Sinha maintained that his email to Mr Hunter on 24 October 2017 (at [870]) was not intended to, and did not, convey to Mr Hunter the possibility that GetSwift would become the supplier of delivery tracking and logistics software for all Yum brands globally: see [878]. Moreover, to the extent that GetSwift relies on Mr Sinha's estimations (although there is a want of direct evidence of reliance), this does not take the matter further, given on any rational view, those high level estimates were nowhere in the range of 250,000,000 deliveries per annum (see [849]) and therefore any estimates did not present as significant a commercial opportunity as GetSwift had conveyed in the Yum Announcement. Finally, GetSwift's reliance on the fact that the Yum MSA Information did not exist or was not material at 1 December 2017 does not take the matter further, given my findings that it existed and was material: see [1690]–[1695], and [1706]–[1709].

2505 Irrespective of any effect the Yum Announcement itself had on GetSwift's share price, I am satisfied that if disclosure of the Yum MSA had included the Yum MSA Information and the Yum Projection Information, it would not have had a material effect on either the price or value of GetSwift's shares. The terms of the Yum MSA, if fully disclosed, revealed there was no agreement as to the provision of GetSwift's services to Yum and no SOW entered into by

[2958] GCS at [1188].
[2959] GCS at [1189].
[2960] T707.26–30 (Day 10).

GetSwift and Pizza Hut International, or any other affiliate of Yum. Further, to the extent ASIC contends GetSwift, Mr Hunter and Mr Macdonald had no reasonable grounds for expecting the Yum MSA to have a material effect on either the price or value of GetSwift's shares, I am satisfied that such a representation was made in the light of my reasons above that GetSwift did not have reasonable grounds for making either the Yum Deliveries Projection (see [2500]) or the Yum Rollout Projection: see [2501].

Yum Quantifiable Benefit Representation

2506 By submitting the Yum Announcement to the ASX, by failing to qualify, withdraw or correct the Yum Announcement following its release and by making the First, Second and Third Quantifiable Announcements Representations, ASIC submits that GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift from the Yum MSA was secure, quantifiable and measurable (**Yum Quantifiable Benefit Representation**).

2507 GetSwift raise similar threshold matters or otherwise repeat arguments concerning the Quantifiable Benefit Representations which I have already rejected: see [2219]–[2221].[2961] Its reliance on its submissions concerning the Yum Deliveries Projection and the Yum Rollout Projection, which I have described in detail above, are also of no moment.[2962] I am satisfied that the Yum Quantifiable Benefit Representation was made and was misleading or likely to mislead. The financial benefit could not have been secure, quantifiable or measurable by reason of the Yum MSA Information and Yum Projection Information.

Conclusion

2508 By failing to disclose the Yum MSA Information and the Yum Projection Information, by reason of their conduct in relation to the First and Second Agreement After Trial Representations, and by contributing to the drafting, approving, authorising and directing the transmission to the ASX of the Yum Announcement (including instructing GetSwift's company secretary to mark the Yum Announcement as price sensitive (see [996]), the April Appendix 4C, the October Appendix 4C and the A Key Partnerships Announcement dated 14

[2961] GCS at [1211].
[2962] GCS at [1212].

November 2017, GetSwift, and Mr Hunter and Mr Macdonald personally, made the Yum MSA Representations, the Yum Price Sensitivity Representations, and the Yum Quantifiable Benefit Representation. As a result, I am able to find that each of them engaged in conduct that was misleading or deceptive, or likely to mislead or deceive.

I.4.16 *Amazon*

2509 ASIC alleges that the following continuing representations were made in respect of Amazon: (1) the Amazon MSA Representations; and (2) the Amazon Quantifiable Benefit Representation.

Amazon MSA Representations

2510 By making the First Amazon Announcement, by making the First and Second Agreement After Trial Representations, and by not disclosing the Amazon MSA Information, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly conveyed the following continuing representations from 1 December 2017 until the date of issue of this proceeding:

(a) any trial period or limited roll out with Amazon had been successfully completed; and

(b) Amazon had entered into an agreement with GetSwift which Amazon could not terminate for convenience

(collectively, the **Amazon MSA Representations**).

2511 Beyond threshold contentions,[2963] two additional matters are raised:

(1) GetSwift contends that the making of the First Amazon Announcement does not form part of the matters said to give rise to the Amazon MSA Representations, given it is only the two sets of generic Agreement After Trial Representations and the non-disclosure of the Amazon MSA Information which are pleaded.[2964]

[2963] GCS at [1270], [1271], [1272]–[1273], and [1277].
[2964] GCS at [1271].

(2) GetSwift submits that before entering into the Amazon MSA, the GetSwift Platform had already been subjected to a trial by Amazon under the THSA. Reliance is placed on the Ms Hardin's evidence, including that she accepted "having done that initial [THSA testing], you wanted to move forward to an MSA" and that "the results of the initial testing were satisfactory enough to Amazon to make it want to take that next step": see [967].[2965] Moreover, GetSwift highlights that ASIC opened its case on the basis that initial testing had taken place under the THSA,[2966] suggesting "it is somewhat extraordinary" that this representation has been alleged.[2967]

2512 The *first* contention is incorrect – ASIC pleaded that the First Amazon Announcement forms part of the matters that give rise to the Amazon MSA Representations.[2968] The *second* contention should also be rejected. While, *prima facie,* it appears that a "trial" was conducted, one needs to recall the nature of the THSA, which was not any type of trial, but rather "initial testing": see [989]–[991]. This mischaracterises the position: Amazon had not undertaken the "pilot" to determine the scale, if any, of its use of GetSwift's service. Indeed, such a "pilot test" could not occur without GetSwift entering into an MSA and agreeing with Amazon to the terms of a Service Order: see [991].

2513 The First Amazon Announcement was submitted for release by the ASX without being qualified, withdrawn, or corrected prior to 6:15pm on 1 December 2017. It was released by the ASX after the First and Second Agreement After Trial Representations had been made. Moreover, the First Amazon Announcement omitted the Amazon MSA Information. In this context, I am satisfied that representation (a) and (b) arises, and the failure to disclose the Amazon MSA Information (which was important contextual and qualifying information which impacted upon how investors would view and assess the announcement) rendered the representation misleading or was likely to mislead. Indeed, the First Amazon Announcement conveyed that Amazon had completed a successful trial and that it could not terminate for convenience, when this was not the true position.

[2965] T743.3–8 (Day 11).
[2966] AOS at [417].
[2967] GCS at [1274]–[1276].
[2968] ASIC Reply at [411]; 4FASCOC at [258(aa)], [258(ab)], and [259(a)].

Amazon Quantifiable Benefit Representation

2514 By making the First Amazon Announcement, ASIC submits that each of GetSwift, and Mr Hunter and Mr Macdonald personally, impliedly represented that the financial benefit to GetSwift under the Amazon MSA was secure, quantifiable and measurable (**Amazon Quantifiable Benefit Representation**). It is said that the First Amazon Announcement must be considered in the context of each of the First, Second and Third Quantifiable Announcements Representations, each of which preceded the release of the First Amazon Announcement.

2515 GetSwift raise similar threshold matters already dealt with (see [2219]–[2221]).[2969] I am satisfied that the Amazon Quantifiable Benefit Representation was made and was misleading or deceptive, or likely to mislead or deceive. The financial benefit could not have been secure, quantifiable or measurable in the light of the Amazon MSA Information.

Amazon conclusions

2516 Each of GetSwift, and Mr Hunter and Mr Macdonald personally, made the Amazon MSA Representations and the Amazon Quantifiable Benefit Representation. Each of them engaged in conduct that was misleading or deceptive, or likely to mislead or deceive investors and potential investors; thereby contravening s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

I.4.17 *Second Placement*

2517 ASIC alleges that the Second Placement Cleansing Notice Representation was made in respect of the Second Placement.

Second Placement Cleansing Notice Representation

2518 By authorising the publication of the Second Placement Cleansing Notice without qualification, ASIC submits that GetSwift, and each of Mr Hunter and Mr Macdonald personally, represented that there was no further information concerning GetSwift that a reasonable person would expect to have a material effect on the price or value of GetSwift's shares which GetSwift had not disclosed to the ASX prior to submitting that Notice (**Second**

[2969] GCS at [1281]–[1284].

Placement Cleansing Notice Representation). Indeed, Messrs Hunter and Macdonald had knowledge of the contents of the Second Placement Cleansing Notice, that it had been submitted to the ASX and they had directed and authorised its transmission to the ASX: see [1779].

2519 The Second Placement Cleansing Notice arises in similar circumstances to the Tranche 1 Cleansing Notice Representation: see [2363]. In addition, it concerned a representation as to a state of affairs that existed at the time of the making of the Second Placement Cleansing Notice Representation.

2520 GetSwift contends that because the contravention is predicated upon the supposed materiality of the information comprising of the Second Placement Information, it must fail.[2970] However, this submission cannot be accepted in the light of my findings as to materiality above.

2521 The Second Placement Cleansing Notice Representation was misleading or deceptive, or likely to mislead or deceive, by reason of my previous findings that at the time of making the Second Placement Cleansing Notice Representation, GetSwift had not notified the ASX of the Second Placement Information: see [1781]. The Second Placement Cleansing Notice Representation was therefore, in whole or in part, misleading because it contained information that a reasonable person would expect to have a material effect on the price or value of shares, but which was not disclosed.

Conclusion

2522 By making the Second Placement Cleansing Notice Representation, and by directing and authorising its transmission to be made to the ASX (see [1779]), GetSwift, and each of Mr Hunter and Mr Macdonald personally, engaged in conduct that was misleading or deceptive, or likely to mislead or deceive investors and potential investors. As such, each contravened s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

J DIRECTORS' DUTIES CLAIMS

2523 Finally, one turns to the claims that each of Messrs Hunter, Macdonald and Eagle breached their directors' duties.

[2970] GCS at [1298].

2524 In addressing this aspect of the case, I will adopt the following structure:

- **Part J.1** will set out the general principles relevant to s 180(1) of the *Corporations Act* and discuss the relationship between the alleged directors' duties contraventions and contentions considered previously.
- **Part J.2** will revisit some of the basal facts, the role of each director and their knowledge of GetSwift's continuous disclosure obligations.
- **Part J.3** will turn to consider whether each director contravened s 180(1) of the *Corporations Act*.

J.1 Statutory scheme and applicable principles

J.1.1 *General principles*

2525 The principles concerning the statutory duty of care and diligence are well established. The relevant section is s 180(1) of the *Corporations Act*, which provides:

> **180 Care and diligence—civil obligation only**
>
> *Care and diligence—directors and other officers*
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
>
> **Note:** This subsection is a civil penalty provision (see section 1317E).

2526 As s 180(1) makes clear, for the section to be engaged, a director or officer must "exercise their powers" or "discharge their duties". Accordingly, the power or the duty being exercised or discharged must be identified along with the source of the power or duty: *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52; (2020) 275 FCR 533 (at 545 [25] per Greenwood J, at 639 [450]–[452] per Thawley J). The section imposes an obligation to meet a statutory standard of care and diligence applicable to the exercise of all of the powers and the discharge of all of the duties of a director or officer, whatever the source: *Cassimatis* (at 639 [450] per Thawley J). If the required degree of care and diligence is not met, then the section will have been contravened: *Cassimatis* (at 639 [450] per Thawley J).

2527 Once the section is engaged, the test under s 180(1) is an objective one and is measured by what an ordinary person, with the knowledge and experience of the relevant director, would have done: *United Petroleum Australia Pty Ltd v Herbert Smith Freehills (a firm)* [2018] VSC 347; (2018) 128 ACSR 324 (at 443 [609] per Elliot J). The ordinary person is a director of the corporation "in the corporation's circumstances" and occupying the particular office held by the director, and having the same "responsibilities within the corporation" as the director whose conduct is impugned: *Cassimatis* (at 545–546 [27] per Greenwood J, and at 640 [455]–[457] per Thawley J).

2528 In determining whether a director has breached the duty imposed by s 180(1), it is necessary to balance the foreseeable risk of harm to the company (including the nature and magnitude of the risk of harm and the degree of probability of its occurrence) against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question, along with the expense and difficulty of taking alleviating action: *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 (at 449–450 per Ipp J); *Australian Securities and Investments Commission (ASIC) v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373 (at 397–398 [102] per Brereton J). Importantly, this is a forward-looking exercise to determine what a reasonable person would have done. It is not a backward-looking exercise to understand what steps would have avoided the relevant harm: *Cassimatis* (at 556 [87] per Greenwood J).

2529 The balancing exercise not only takes into account commercial considerations and monetary consequences, but extends to "all of the interests of the corporation": *Cassimatis* (at 640–641 [459] per Thawley J). While commercial activity necessarily permits a company to take risks that individuals may themselves not be willing to assume, the company fiction does not facilitate unlawful risky activity without personal responsibility: *Cassimatis* (at 640–641 [459] per Thawley J).

2530 There are two elements as to the content of the duty of reasonable care and diligence under s 180(1) of the *Corporations Act*, namely: (a) the circumstances of the company; and (b) the position and responsibilities of the director.

2531 As to the circumstances of the company, this includes: the type of company, the provisions of its constitution; the size and nature of the company's business; the composition of the board, the director's position and responsibilities within the company; the particular function the director is performing; the experience or skills of the particular director; the terms on which he

or she has undertaken to act as a director; the manner in which responsibility for the business of the company is distributed between its directors and its employees; and the circumstances of the specific case: *Maxwell* (at 397 [100] per Brereton J).

2532 The "responsibilities" referred to by s 180(1) do not just refer to statutory responsibilities that the *Corporations Act* imposes upon the director, but include whatever responsibilities the director has "within the corporation, regardless of how or why those responsibilities came to be imposed on that [director]": *Cassimatis* (at 545–546 [27] per Greenwood J, and at 640 [457] per Thawley J); citing *Shafron v Australian Securities and Investments Commission (ASIC)* [2012] HCA 18; (2012) 247 CLR 465 (at 476 [18] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). In this sense, it refers to "factual arrangements operating within the company and affecting the director or officer in question": *ASIC v Rich* (at 131–132 [7202] per Austin J).

2533 Section 180 does not impose a standard of perfection. As such, making a mistake does not in itself demonstrate a lack of due care and diligence: *Australian Securities and Investments Commission (ASIC) v Lindberg* [2012] VSC 332; (2012) 91 ACSR 640 (at 654 [72] per Robson J). In *Rich*, Austin J (at 141 [7242]) said:

> The statute requires the court to apply a standard defined in terms of the degree of care and diligence that a reasonable person would exercise, taking into account the corporation's circumstances, the offices occupied by the defendants and their responsibilities within the corporation. That requires the defendants' conduct to be assessed with close regard to the circumstances existing at the relevant time, without the benefit of hindsight, and with the distinction between negligence and mistakes or errors of judgment firmly in mind. If the impugned conduct is found to be a mere error of judgment, then the statutory standard under s 180(1) is not contravened…

2534 Further, s 180(1) of the *Corporations Act* does not require the conduct to have caused loss for a contravention to have occurred: *Cassimatis* (at 639 [449] per Thawley J).

2535 Finally, while directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company, they are entitled to rely upon others; however, an exception exists where the director knows, or by the exercise of ordinary care should now, facts that would deny reliance: *Australian Securities and Investments Commission (ASIC) v Healey* [2011] FCA 717; (2011) 196 FCR 291 (at 330 [167] per Middleton J); *Australian Prudential Regulation Authority v Kelaher* [2019] FCA 1521; (2019) 138 ACSR 459 (at 476 [41] per Jagot J). A non-executive director *may* rely on management and other officers to a greater extent than an executive director, but beyond this no general statement can

be made: *Morley v Australian Securities and Investments Commission (ASIC)* [2010] NSWCA 331; (2010) 274 ALR 205 (at 355 [807] per Spigelman CJ, Beazley and Giles JJA).

J.1.2 *The interaction between each of the contraventions*

2536 At least these contraventions are of civil penalty provisions. But if one has the Job-like endurance to reach this point, no doubt the question arises: yet another set of contraventions alleged against the directors, but how does this interact with those that have been discussed previously?

The relationship between ss 674(2) and 180(1) contraventions

2537 As to the interaction between GetSwift's continuous disclosure contraventions under s 674(2) and the director's liability under s 180(1), the parties seemed to accept that while GetSwift's s 674(2) contraventions may be relevant to determining whether a director has breached s 180(1), it is in no way determinative. This is sometimes referred to as the "stepping stone" analysis, although phrases such as "stepping stones" have been described as being "unhelpful and apt to throw sand in the eyes of the analysis", as Greenwood J stated in *Cassimatis* (at 555 [79]):

> The appellants were not found to have contravened s 180 of the Act because the corporation contravened the Act. The contraventions of the Act by [the corporation] were a necessary element of the harm, but not sufficient by themselves to result in a contravention of s 180 by the appellants as directors. **The foundation of the liability of the appellants resides entirely in their own conduct in contravention of the objective degree of care and diligence required of them by the statutory standard contained within s 180 of the Act.**
>
> (Emphasis added).

2538 While it is common that a director may contribute to a company's breach of s 674(2), in effect exposing the company to civil penalties or other liability, the liability of the director does not automatically follow from the company's contravention at the time the defendant was a director: *Vocation* (at 330 [730] per Nicholas J). Indeed, there is no obligation on directors under s 180(1) to conduct the affairs of the company in accordance with the law generally or the *Corporations Act* specifically: *Cassimatis* (at 641 [460] per Thawley J); citing *Maxwell* (at 399 [104], 402 [110] per Brereton J). Instead, liability under s 180(1) is trigged in circumstances where the director's failure to exercise reasonable care and diligence has caused, or allowed, the company to contravene the *Corporations Act*, at least where it was reasonably foreseeable that such contravention might harm the company's interests: *Vocation* (at 330 [730] per Nicholas J). That is, the relevant analysis concerns whether, and the extent to which, the

corporation's interests were jeopardised, and if so, whether the risks obviously outweighed any potential countervailing benefits, along with whether there were reasonable steps which could have been taken to avoid them: *Maxwell* (at 402 [110] per Brereton J). The fact of a contravention by a company, is therefore but one factor relevant to be considered when determining whether a director has met the statutory standard. Alternatively stated, a director's liability under s 180(1) of the *Corporations Act* is direct and is not derivative from a company's contravention: *Cassimatis* (at 641 [463] per Thawley J).

2539 Of course, the issue as to whether a director can be found to have breached s 180(1) in the context of disclosure obligations, in the absence of a s 674(2) contravention, does not arise given all of the contraventions against GetSwift are made out: see table at Part H.1.

The relationship between ss 674(2A), 1041H, 12DA and 180(1)

2540 A further point of interaction that should be noted is the relationship between ss 674(2A), 1041H, 12DA and 180(1). A breach of s 180(1) is to be assessed on an objective basis. However, in the circumstances of this case where either Messrs Hunter, Macdonald or Eagle were subjectively were aware of the materiality of omitted information (the s 674(2A) case), or were found to be personally involved in making misleading or deceptive representations (the ss 1041H and 12DA case), it is difficult to see how their conduct could be said not to fall short of the standard required by s 180(1) on an objective basis.

2541 The real point of contest lies elsewhere: where a contravention has been made out against the company, but personal liability has not been made out against one of the directors. Mr Eagle submits that if he did not contravene s 674(2A) of the *Corporations Act*, he cannot be held to be liable under s 180(1).[2971] At a level of abstraction, that contention must be rejected. ASIC's case against the directors under s 180(1) is independent of whether they themselves contravened s 674(2A). That is, ASIC alleges that irrespective of whether Mr Eagle contravened s 674(2A), Mr Eagle failed in his duty by failing to take steps to prevent GetSwift from contravening s 674(2), by causing or permitting those contraventions to occur, and not taking steps to mitigate the risk of GetSwift doing so.

[2971] ECS at [97].

2542 Before moving on, I should dispose of another pleading point. Mr Macdonald submits that:

> ASIC's case that Mr Macdonald contravened s 180(1) of the *Corporations Act* is that Mr Macdonald had actual knowledge of particular information (i.e., the so-called Macdonald Omitted Information). ASIC submits that, because of Mr Macdonald's actual knowledge of the alleged Macdonald Omitted Information, he should have foreseen of the risk of certain contraventions by GetSwift of ss 674(2) and 1041H of the Corporations Act and/or s 12DA of the *ASIC Act*. It is not part of ASIC's case that Mr Macdonald contravened s 180(1) that he ought to have known the alleged Macdonald Omitted Information or that he knew or ought to have known any information other than the Macdonald Omitted Information.[2972]

2543 This submission should not be accepted. When one appreciates the particulars of knowledge that were provided by ASIC on 5 June 2021, one sees the words "knew or ought to have known" relentlessly repeated. Indeed, Dr Higgins seemed to accept as much:

> DR HIGGINS: Well, we say this: strictly, it's in the particulars. What it isn't is in the case exposed to your Honour by ASIC and what your Honour – if your Honour decided it was available to ASIC, what your Honour would not be able to do is satisfy yourself that the facts advanced in support of actual knowledge discharged the test of constructive knowledge. Now, can I identify at least one reason why that's so. Your Honour looks sceptical. Let me try.
>
> HIS HONOUR: No, I'm just working out where the rubber hits the road in relation to this submission. If I was satisfied on the basis of the evidence that Mr Macdonald ought to have known X and that is relevant to an ultimate determination whether he breached section 180, but I don't, in accordance with section 140(1) of the Evidence Act, reach a level of satisfaction that he did know X, do you say they're precluded from making out a breach of section 180 or not?
>
> DR HIGGINS: We say it's not pleaded, but it is particularised and we say the case, as maintained by ASIC, will not allow your Honour safely to reach that conclusion.
>
> HIS HONOUR: Yes. Well, that's a different point.
>
> DR HIGGINS: Yes.[2973]

2544 Although this submission pressed, Dr Higgins' inclination as to my scepticism was well-founded; the submission should be rejected. [2974] In any event, there is a more fundamental issue with this contention; that is, the statutory test in s 180(1) is, by its very nature, an *objective* one.

[2972] HCS at [122] (citations omitted).
[2973] T1182.35–1183.6 (Day 17).
[2974] T1228.36–40 (Day 18).

J.2 Overview of the director's duties contraventions

2545 ASIC alleges that each of Messrs Hunter, Macdonald and Eagle contravened s 180(1) in three different ways:

(1) *as against Mr Hunter, Mr Macdonald and Mr Eagle*, each of them failed to exercise care and diligence in causing or permitting GetSwift to contravene s 674(2) of the *Corporations Act* in circumstances where it was reasonably foreseeable that their conduct might harm the company's interests;

(2) *as against Mr Hunter and Mr Macdonald only*, each of them failed to exercise care and diligence that caused or permitted GetSwift to contravene s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* in circumstances where it was reasonably foreseeable that their conduct might harm the interests of the company; and

(3) *as against Mr Hunter, Mr Macdonald and Mr Eagle*, each of them failed to exercise care and diligence by failing to take reasonable steps to mitigate certain risks, thereby exposing GetSwift to the risk of legal proceedings for contraventions of the *Corporations Act*, legal costs and penalties.

J.2.1 *Revisiting some basal facts and the position of each director*

2546 Before assessing whether each director contravened s 180(1) of the *Corporations Act*, it is necessary to recall some basics about the circumstances of GetSwift and the position and responsibilities of the director. That is because, as stated above, these factors underpin an analysis of the duty of reasonable care and diligence under s 180(1): *Maxwell* (at 397 [100] per Brereton J). There is a practical limit to how long this judgment can be, and so, what follows obviously builds on what has already been canvassed and is in no way intended to be an exclusive collection of facts relevant to the assessment of the s 180(1) contraventions.

The circumstances of GetSwift

2547 The contraventions alleged by ASIC arise during 2017, although many of the contraventions are alleged to be continuing ones. The following features of GetSwift are of importance in assessing the degree of care and diligence expected of a reasonable person in the position of Messrs Hunter, Macdonald and Eagle:

(1) GetSwift was an "early-stage technology company" that had "incurred historic operating losses to date", including, as at 30 June 2016, an accumulated loss of approximately $946,402: see [23].

(2) GetSwift had embarked upon an aggressive strategy to pursue growth, which was explained in its Prospectus: see [1119].

(3) GetSwift's source of revenue was dependent on both Enterprise and "self-serve" clients, however, it was well understood, and the market had been informed, that GetSwift's growth and expansion was dependent upon entry into contracts with Enterprise Clients (being those clients with 10,000 or more deliveries per month): see [24].[2975]

(4) GetSwift's technology was nascent. It had to be tested, adapted and customised to suit customers' needs and systems. Indeed, GetSwift had informed the market in its Prospectus that clients typically undertook a proof of concept or trial period of 90 days before executing contracts (see [25]); information repeated to the market through the First and Second Agreement After Trial Representation: see [26]–[27], [2176]–[2181], [2190]–[2195].

(5) Although GetSwift had raised $5 million through the IPO, there was likely a need to raise further capital to fund the growth strategy that GetSwift had embarked upon. As a result, it was important for GetSwift to inform the market about its client "wins" and developments to facilitate investors looking favourably upon GetSwift.

(6) From the date of the First Quantifiable Announcements Representation (28 April 2017), GetSwift had communicated to the market, and the market understood, that GetSwift would make announcements about transformative and game-changing partnerships but only when the financial benefits associated with them were known to be secure, quantifiable and measurable. It follows that investors would look at GetSwift's announcements as to entry into client contracts to make an assessment of the growth of the business and its future revenue streams and gain confidence that clients (who had entered into contracts had successfully completed a proof of concept or trial period) were satisfied and content with GetSwift's technology.

(7) Investors were generally aware of the risks, being that ongoing customisation might be needed, that there would a period of time before a full roll out or integration could occur, that a pay-per-use model revenue was contingent upon the client using the

[2975] Prospectus (GSW.1001.0001.0478) at 0507.

service and that clients could terminate their contracts at any stage. However, given that investors understood that clients had successfully completed a proof of concept or trial period, had agreed to transition to the next phase of agreement in which they would be paying for use of the GetSwift Platform, that GetSwift was often the exclusive provider of last-mile delivery services for its clients and the term of the agreements entered into with the client by GetSwift were usually for a period of more than 12 months, investors would have had confidence that those risks had been substantially reduced: see [1117]–[1141], [1902].

(8) There was very little equity research or analysts' reports relating to GetSwift, and investors largely were left to rely upon GetSwift's market announcements and their own research to gain an insight into GetSwift's progress: see [1155].

(9) From these matters, and flowing from previous discussions above, I accept an important aspect of GetSwift's business was not only developing its technology and securing client contracts, but also communicating its execution of client agreements to engender and reinforce investor expectations as to its growth and success and to facilitate it raising capital to fund its development and growth.

The position of each director

2548 I have already dealt at length the role of each director and the "division of labour" that existed at GetSwift: see Part H.4.3. I do not propose to repeat what I set out there, but simply reiterate the following points.

2549 *First*, the formal position of each director was as follows:

(1) Mr Hunter was the "executive chairman", and under his employment agreement, was responsible for "operational global strategy".[2976] As at 26 October 2016, Mr Hunter held approximately 6.71 million shares, or 5.33% of GetSwift's issued share capital.[2977]

(2) Mr Macdonald was GetSwift's "managing director" and as at 26 October 2016, held approximately 32.58 million shares, or 25.85% of GetSwift's issued share capital.[2978]

[2976] GSWASIC00066813 at 6816.
[2977] GSW.1001.0001.0478 at 0494.
[2978] GSW.1001.0001.0478 at 0494.

(3) Between 26 October 2016 and 28 November 2018, Mr Eagle was a non-executive director of GetSwift and as at 26 October 2016, Mr Eagle also held approximately 1.65 million shares, or 1.31% of GetSwift's issued share capital.[2979] The evidence suggests that he was at least the *de facto* General Counsel of GetSwift from early February 2017: see [52].

2550 Mr Macdonald places emphasis on the division of responsibility as outlined in the director's respective employment agreements.[2980] For example, he highlights how Mr Hunter's employment agreement provided that he shall "serve the Company in the operational capacity of Executive Chairman, in *addition to being responsible for operational global strategy* & member of the Board",[2981] whereas Mr Macdonald's simply stated that he shall "serve the Company in the operational capacity of Managing Director & member of the Board".[2982] Of course, the formal allocation of responsibility will be relevant in determining the roles and responsibilities of those within a corporation, but this must yield to the reality of how the business was actually run. GetSwift was no blue chip bank. As the evidence reveals, there was initially little by the way of formal procedure: board meetings were irregular and unstructured (the then company secretary was even told not to show up) (see [55]); agreements and announcements were negotiated and approved helter-skelter; and the fact was that those underneath Messrs Hunter and Macdonald were told what to do and how to do it, and when something went awry, the relevant employee was scolded. However, processes developed and some form of perceived pragmatic approach developed. In these circumstances, the primary focus must be on what the evidence reveals about the *actual* roles and responsibilities of each director, rather than what was reflected in the text of the respective employment agreements.

2551 *Secondly,* each of the directors had knowledge of, and was aware of GetSwift's continuous disclosure obligations (most explicitly by reason of statements in the Prospectus and Continuous Disclosure Policy): see [29]–[30], [1901], [1903]–[1906].

2552 *Thirdly,* broadly speaking, by reason of the offices they held, Messrs Hunter, Macdonald and Eagle undertook responsibilities by which they were involved in: (a) the negotiation and

[2979] GSW.1001.0001.0478 at 0494.
[2980] GSWASIC00066813 and GSWASIC00066870.
[2981] GSWASIC00066813 (emphasis added).
[2982] GSWASIC00066870.

finalisation of client agreements; and (b) the preparation, approval and transmission of ASX announcements. However, as the evidence reveals, the extent of the engagement of each director was, in broad summary, as follows:

(1) Messrs Hunter and Macdonald were primarily responsible for the negotiation and drafting of the client agreements, although it is apparent that Mr Macdonald was often more heavily involved in this process than Mr Hunter.

(2) Mr Hunter was the main draftsman behind the ASX announcements. At one point when there was talk of farming the role out, he stated that "I need to do this – it's [a] very specific skill set": see [1824], [1919]. In saying this, Mr Hunter invariably sought Mr Macdonald's input and feedback as to the content of the ASX announcements: see, e.g., [225], [568], [613], [697], [818], [896], and [994]. In laying the ground rules, he made plain that what was to be released to the ASX was "[c]ontent as directed and approved by Joel – NOT Brett, Jamila or anybody else": see [1919]. Indeed, unlike the last minute circulation of the draft ASX announcements to Mr Eagle and Ms Gordon, the evidence reveals Messrs Hunter and Macdonald often communicated beforehand about announcements in private: see, e.g., [416], and [568]. They also communicated to the exclusion of the others in regard to the timing and strategic release of announcements: see [1842]–[1851]. It is therefore accurate to say both Mr Macdonald and Mr Hunter "approved" the announcements.

(3) Mr Eagle's involvement in the drafting of client agreements was varied. On some occasions he was directed to provide comment on specific terms of an agreement: see, e.g., Pizza Pan (at [404]–[405]) and Betta Homes (at [655]–[657]). On other occasions, he negotiated quite extensively with Messrs Hunter and Macdonald and the client contact: see, e.g., Yum (at [882]–[884] and [887]–[892]). In respect of the ASX announcements, as I have said above, Mr Eagle's involvement was often limited to being circulated with drafts within hours of their release as a sort of box-ticking exercise: see [1918], [1921], [1943]. This fact, along with the emails being copied to Ms Gordon, led me to conclude, in the absence of evidence to the contrary, that Mr Eagle was primarily being asked to review any proposed announcements in his capacity as a non-executive director, not as a solicitor: see [1921(2)].

J.2.2 *The degree of care and diligence to be exercised generally*

2553 In assessing the degree of care and diligence that a reasonable person would have exercised if they were a director of a corporation in the circumstances of GetSwift, and if they occupied the same office held by, and had the same responsibilities as, Messrs Hunter, Macdonald and Eagle, the following salient factors are relevant.

2554 *First*, in assessing the standard of care expected of a director in these circumstances, one must have regard to the important function served by the release ASX announcements; that is, the regulatory purpose of conveying to investors information that will, or will likely, influence a decision to acquire or dispose of shares in GetSwift. Directly related to this, underpinning continuous disclosure obligations and the prohibition on engaging in misleading or deceptive conduct is the fact that corporations possess information not generally available which, if made known, may influence the decision of investors to acquire or dispose of shares in a listed entity. Of course, as noted above, the timely, accurate and complete disclosure of information is critical to ensuring market integrity and efficiency.

2555 *Secondly*, particularly taking into account the specific circumstances of a company like GetSwift, which was relatively new, not making a profit and was embarking upon a high growth and expansion strategy (and where continuous disclosure had potentially more importance than in established companies with a long history of stable earnings and periodic disclosure), directors acting in accordance with the statutory norm would have taken adequate steps to satisfy themselves as to whether what was being conveyed to the market was accurate and adequate.

2556 *Thirdly*, the standard of care expected of a director in the circumstances must take into account statements that were made to the public (of which each director was aware), including through the Prospectus, April Appendix 4C, the May Investor Presentation, the October Appendix 4C and the Key Partnerships Announcement (in which GetSwift made the First and Second Agreement After Trial Representations (see [2181], [2195]) and the Quantifiable Announcements Representations: see [2189], [2200], [2209]).[2983] It is relevant that each of these announcements created, engendered and reinforced investor expectations concerning the

[2983] Key Partnerships Announcement (GSW.1001.0001.0286).

GetSwift business and its future prospects. The standard of care must also have regard to the fact that investors would have placed reliance upon announcements as to executed contracts to measure the degree of GetSwift's success in achieving its strategy as disclosed in the ASX announcements. These announcements would have provided investors with a means by which they could assess whether GetSwift was implementing its overall strategy as well as a basis to make predictions about future revenue flows. Statements in the Prospectus were further relevant in that they conveyed to investors that Enterprise Clients were sufficiently satisfied with the trial, were willing to enter into long term and exclusive contracts, and were ready to commence paying for the GetSwift Platform.

2557 *Fourthly*, the standard of care must be applied with regard to how Messrs Hunter, Macdonald and Eagle were involved in the negotiation of the relevant client agreements or had knowledge of their terms, and were also involved in the preparation or approval of the corresponding ASX announcements (and also had knowledge of their terms).

2558 *Fifthly*, I should note that as to the risk of foreseeable harm arising from the prospect of GetSwift contravening s 674(2), the standard of care expected of Messrs Hunter, Macdonald and Eagle does not depend on ASIC establishing that each of them: (a) was aware of the omitted information; (b) had knowledge that the omitted information was not generally available; and (c) had knowledge as to the materiality of the omitted information. Rather, it must be shown that a reasonable director in the position of Messrs Hunter, Macdonald and Eagle, exercising reasonable care and diligence, would have appreciated the risk of harm of a contravention, and would have appreciated that there was a risk GetSwift was aware of the omitted information, that it was not generally available and that it was material. However, I should note that in circumstances where it has been proven that they had knowledge of these factors, such a conclusion is all the more compelling.

2559 Similarly, in respect of the risk of foreseeable harm arising from the prospect of GetSwift contravening s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*, the standard of care expected of Messrs Hunter and Macdonald does not depend upon ASIC establishing that each of them had knowledge of the falsity or misleading nature of the representations information. Instead, it must be shown that, having regard to GetSwift's circumstances, a reasonable director in their position exercising reasonable care and diligence would have appreciated the risk of harm of a contravention of those provisions, and would have appreciated that there was a risk that GetSwift was making inaccurate or incomplete announcements.

2560 With these risks in mind, speaking at a broad level, a reasonable person would have appreciated the foreseeable risk and taken reasonable steps to: (a) mitigate the risks that any announcement or other document each of them reviewed for submission to the ASX was inaccurate or misleading; (b) qualify, withdraw or correct any existing announcement or document lodged with ASX to mitigate the risk that such announcement was inaccurate or misleading; (c) mitigate the risk that an agreement was announced when the associated financial benefit to GetSwift was not secure, quantifiable and measurable; and (d) mitigate the risk that material information concerning an announcement that GetSwift had made to the ASX was not disclosed (**Announcement Risks**).

2561 Having set out these general matters, it is appropriate to turn to consider the facts pertaining to each of the directors.

J.3 The Directors

2562 There is no need to go through the detailed factual background again. It suffices to say that even if I am wrong in relation to any of the s 674(2A), 1041H or s 12DA contraventions, I am satisfied that Messrs Hunter, Macdonald and Eagle breached their directors' duties under s 180(1) of the *Corporations Act*, given the tests are independent. As will be revealed, in some instances I am satisfied that contravening conduct can be established in respect of Enterprise Clients for which the directors were found not to be accessorily liable for GetSwift's s 674(2) contraventions.

J.3.1 *Mr Hunter*

2563 Between 20 February 2017 and 22 December 2017, Mr Hunter was involved in drafting and/or approving each of the following announcements and authorised GetSwift to submit them to the ASX for release: the Fruit Box Announcement (see [1271], [1273]–[1274]); the CBA Announcement (see [1319]–[1320]); the Pizza Hut Announcement (see [1368]–[1369]); the APT Announcement (see [1406]); the CITO Announcement (see [1453]); the Fantastic Furniture & Betta Homes Announcement (see [1508]); the Bareburger Announcement (see [1573]–[1574]); the Second NAW Announcement (see [1597]–[1600]); the Third NAW Announcement (see [1659]); the Johnny Rockets Announcement (see [1664]); the Yum Announcement (see [1689]); the First Amazon Announcement (see [1750]); the Tranche 1 Cleansing Notice (see [1501]); the Tranche 2 Cleansing Notice (see [1504]); the Second Placement Trading Halt (see [1776]–[1777]); and the Second Placement Cleansing Notice (see [1779]) (collectively, the **Hunter Announcements**).

2564 The Hunter Announcements contained representations that were misleading or deceptive or likely to mislead or deceive investors for the reasons set out in Part I above. The Hunter Announcements also omitted information, of which, for the large part, Mr Hunter was aware, and this information was material (the Hunter Omitted Information, as defined at [1977]).

2565 I note that for the purposes of this section only, I will exclude from the definition of the Hunter Omitted Information: (a) the Betta Homes No Financial Benefit Information; (b) the NAW Projection Information; and (c) the CITO No Financial Benefit Information, which raise idiosyncratic issues that will be dealt with separately at the end.

Did Mr Hunter breach s 180(1)?

2566 Mr Hunter did not cause GetSwift to notify the ASX of any of the Hunter Omitted Information, whether as part of the corresponding Hunter Announcements, or subsequently, during the period in which it is alleged the corresponding GetSwift continuous disclosure contraventions occurred (as set out in the factual narratives in respect of each relevant Enterprise Client).

2567 By reason of Mr Hunter's position as Chairman, his executive duties with respect to continuous disclosure as outlined in the Prospectus and the Continuous Disclosure Policy, his role as primary draftsman of ASX announcements, his knowledge of the relevant agreements, his focus on ensuring ASX announcements were marked price sensitive, and his use of ASX announcements to engender and reinforce investor expectations and, in turn, influence GetSwift's share price, I am amply satisfied that a reasonable director in his position, acting with due care and diligence, would have foreseen the *risk* of contraventions of s 674(2) of the *Corporations Act*. A reasonable director in his position would have appreciated that the relevant Hunter Omitted Information was important qualifying information for each of the corresponding Hunter Announcements, was not generally available, and if made generally available was likely to be material.

2568 In circumstances where I have found Mr Hunter subjectively knew the Hunter Omitted Information was material, it would be otiose of me to repeat the line by line analysis imparting an objective standard. The bottom line is that he was the draftsman of each ASX announcement, he was aware of the omitted information, and regardless of whether he subjectively knew this information was material (as I have found in Part H.4.4), it was material and, given his position, he ought to have known that it was.

2569 I should note for completeness that for the reasons detailed above (at [1915]–[1922]), I specifically reject the contention, belied by what actually went on within GetSwift, that it was reasonable for Mr Hunter to expect that any of the ASX announcements would be reviewed by Mr Eagle in his capacity as general counsel (*de facto* or otherwise) prior to its release.[2984] The evidence not only reveals that Mr Eagle was often sent announcements very shortly before their release, but Mr Hunter did not give mind to what he had to say. Mr Eagle's proposed removal of the term "multi-year" in the Pizza Pan Agreement is a prime example: see [419], [428].

2570 Further, by reason of the same matters, a reasonable director in the position of Mr Hunter, acting with due care and diligence, would have also foreseen the risk of contraventions of s 1041H of the *Corporations Act* and/or s 12DA of the *ASIC Act*. They would have known that the relevant Hunter Omitted Information was important, accurate, complete and qualifying information in respect of each of the corresponding Hunter Announcements and would have recognised that without disclosing that information GetSwift would be painting an incomplete picture.

2571 I am satisfied that, objectively speaking, a reasonable director in Mr Hunter's position would have, acting with due care and diligence, at the very least, taken the following steps:

(1) first and foremost, not drafted or approved the Hunter Announcements in the terms in which they were published;

(2) not authorised or approved the company secretary (or any other officer of GetSwift) to allow the Hunter Announcements to be submitted to the ASX for publication in their terms;

(3) qualified or corrected each of the Hunter Announcements, so that in substance they referred to the corresponding Hunter Omitted Information, or alternatively should have withdrawn the relevant announcement;

(4) not authorised or otherwise approved or permitted the First Placement to proceed without disclosure of the First Placement Information;

[2984] See HCS [88], [112(d)]–[114], [130]–[131], [159], [176], [190]–[191], [222], [238], [255], [273]–[274], [280], and [284]–[285].

(5) not authorised or otherwise approved or permitted the Second Placement to proceed without disclosure of the Second Placement Information;

(6) verified that the statements made in the Hunter Announcements were correct and did not omit information that qualified or contradicted their terms or was otherwise inconsistent, including (as and when they were made) each of the First and Second Agreement After Trial Representations and each of the First, Second and Third Quantifiable Announcements Representations and if inconsistent, should have qualified, corrected or withdrawn (as necessary) the Hunter Announcements to ensure they were consistent with each of those representations;

(7) in relation to the NAW Agreement Execution Information, disclosed that information as soon as practicable on, or immediately after, 18 August 2017; and

(8) drafted or approved or given their authorisation or approval to the company secretary (or any other officer of GetSwift) to draft and provide to the ASX, announcements for publication by the ASX that disclosed the Fruit Box Termination Information, the APT No Financial Benefit Information, and the Johnny Rockets Termination Information.

2572 None of these steps were taken by Mr Hunter.

Mr Hunter unique contraventions

2573 Three unique contraventions should be addressed in respect to Mr Hunter: (a) the NAW Projection Information; (b) the Betta Homes No Financial Benefit Information; and (c) the CITO No Financial Benefit Information.

2574 *First*, while I found that Mr Hunter knew some of the component parts making up the NAW Projection Information, I found, and not without some hesitation, I was not satisfied that he knew this information was material. This conclusion should carry through. To my mind, in the present circumstances, there is no relevant distinction between my finding that I was not satisfied Mr Hunter held an opinion that ought to have held by reason of facts known to him (see [1627]–[1629], [2001]), and the standard mandated by s 180(1), that makes the reasoning of the former inapplicable to the latter.

2575 *Secondly*, I did not find that Mr Hunter was aware of the Betta Homes No Financial Benefit Information: see [1562]. Naturally, this meant that there could be no accessorial liability case against him in this respect and he was not satisfied he was personally responsible for the Betta Homes No Financial Benefit Representations: see [2007], [2014]. In line with these findings,

the difficulty in pinpointing any involvement of Mr Hunter with Betta Homes following the 22 August 2017 (see [1562]), and the fact that the evidence reveals Mr Hunter's role was more of a "rainmaker" – securing clients, negotiating agreements, and announcing contracts to the market – I am not satisfied he breached s 180(1) in this respect. Of course, it is quite right to assert that at some point along the continuum, a reasonable director in his position ought to have become aware of the fact Betta Homes had dropped off and taken steps to disclose that information, but given I am unassisted by submissions in this regard, there is too much speculation as to what point in time this ought to have occurred, to make a positive finding that this conduct in respect of the Betta Homes No Financial Benefit Information contravened s 180(1).

2576 *Thirdly*, much the same as with respect to the Betta Homes No Financial Benefit Information, I was not satisfied Mr Hunter was aware of the CITO No Financial Benefit Information: see [1480]–[1481]. While, of course, he ought to have become aware of the CITO No Financial Benefit Information at some point in 2018, given his role and responsibilities did not seem to include regular client contact following the announcement of an agreement, on the evidence available to me, I cannot pinpoint when this would be (and ASIC has not developed such a case). I am therefore not prepared to find that he contravened s 180(1) in respect of the CITO No Financial Benefit Information.

Mr Hunter s 180(1) conclusions

2577 By reason of the above, subject to the qualifications I have outlined, I am satisfied that Mr Hunter caused or permitted GetSwift to contravene statutory norms of conduct in circumstances where it was reasonably foreseeable that engaging in the conduct referred to might harm the interests of GetSwift by exposing GetSwift to the risk of legal proceedings for contraventions, legal costs and penalties. Mr Hunter also failed to take reasonable steps to mitigate the Announcement Risks.

J.3.2 *Mr Macdonald*

2578 My reasoning in respect of Mr Macdonald proceeds along much the same lines, but it is necessary to separate it out, given his differing involvement.

2579 Between 24 February 2017 and 22 December 2017, Mr Macdonald approved the following announcements, authorised GetSwift to submit them to the ASX for release, or otherwise had knowledge of their contents: (a) the Fruit Box Announcement (see [1271], [1275]); (b) the

CBA Announcement (see [1319]–[1320]); (c) the Pizza Hut Announcement (see [1368]–[1369]); (d) the APT Announcement (see [1406]); (e) the CITO Announcement (see [1453]); (f) the Hungry Harvest Announcement (see [1491]–[1492]); (g) the Fantastic Furniture & Betta Homes Announcement (see [1508]); (h) the Bareburger Announcement (see [1574]); (i) the Second NAW Announcement (see [1599]–[1601]); (j) the Third NAW Announcement (see [1659]); (k) the Johnny Rockets Announcement (see [1664]); (l) the Yum Announcement (see [1689]); (m) the First Amazon Announcement (see [1750]); (n) the Tranche 1 Cleansing Notice (see [1501]); (o) the Tranche 2 Cleansing Notice (see [1504]); (p) the Second Placement Trading Halt (see [1776]–[1777]); (q) and the Second Placement Cleansing Notice (see [1779]) (collectively, the **Macdonald Announcements**).

2580 The Macdonald Announcements omitted information of which Mr Macdonald was largely aware, and which I have found was material (the Macdonald Omitted Information, as defined at [2023]). The Macdonald Announcements also contained representations that were misleading or deceptive or likely to mislead or deceive investors for the reasons set out in Part I above. Like in respect of Mr Hunter, there are two unique contraventions I will excise from the definition of the Macdonald Omitted Information, and address at the end. That is: (a) the NAW Projection Information; and (b) the Betta Homes No Financial Benefit Information.

Did Mr Macdonald breach s 180(1)?

2581 Mr Macdonald's involvement in negotiating client agreements, his approval of ASX announcements, and his close, abiding and apparently uncritical relationship with Mr Hunter, means I have ultimately found his culpability to be relatively indistinguishable. Although Mr Hunter was the more dominant within GetSwift, this did not mean Mr Hunter was at all marginalised. To the contrary, as explained above, he was often the force behind the negotiation of Enterprise Client agreements, and although not the draftsman for the majority of ASX announcements, almost invariably he provided his sign off – a sign off that Mr Hunter viewed as essential. Further, alongside Mr Hunter (although to a lesser extent), he often requested that announcements be released as price sensitive, and understood the importance of consistently releasing ASX announcements which conveyed "good news" to reinforce and engender investor expectations and, in turn, influence GetSwift's share price.

2582 I am satisfied that a reasonable director in the position of Mr Macdonald, acting with due care and diligence, would have foreseen the risk of continuous disclosure contraventions and appreciated the risk that the Macdonald Omitted Information was important qualifying

information for each of the corresponding Macdonald Announcements, was not generally available, and if made generally available was likely to be material. Indeed, a reasonable director in Mr Macdonald's position would have recognised that GetSwift was required to disclose the Macdonald Omitted Information in order to comply with its continuous disclosure obligations. So much so is made plain by the fact that I have found he actually knew this information was material to investors: see Part H.4.4. Even if I was wrong to conclude that Mr Macdonald was accessorily liable for GetSwift's continuous disclosure contraventions, the basic facts are that he was aware of the terms of the relevant agreements and the respective ASX announcements and therefore was aware of the Hunter Omitted Information. With knowledge of these factors, and in the light of my general discussion above (see [2545]–[2561]), he ought to have appreciated that the relevant omitted information was important qualifying information for each of the corresponding Macdonald Announcements, was not generally available, and if made generally available was likely to have a material effect.

2583 By reason of the same matters, I am satisfied that a reasonable director in the position of Mr Macdonald, acting with due care and diligence, would have foreseen the risk of a contravention of s 1041H of the *Corporations Act* or s 12DA of the *ASIC Act*. They would have appreciated the risk that the relevant Macdonald Omitted Information was important, accurate, complete and qualifying information in respect of each corresponding Macdonald Announcement and that without disclosing that Information, GetSwift would be engaging in misleading and deceptive conduct by painting an incomplete picture.

2584 The reasonable steps I have outlined Mr Hunter should have taken apply equally in respect of Mr Macdonald, and I do not propose to repeat them: see [2571]. I should, however, reinforce that I appreciate and have taken into account the fact that Mr Macdonald was not the main draftsman of the ASX announcements. But this does not matter. He was the man who had primary carriage of the negotiation of Enterprise Client Agreements, and in almost all instances, approved the ASX announcements and the content of what was to be released to the market. He also often edited the draft ASX announcements, and at times himself directed the announcements to be released by the ASX as "price sensitive". In the circumstances where he gave his approval, this was not half-hearted – his involvement mattered and, as the evidence reveals, was essential before Mr Hunter made a move. I am therefore satisfied that Mr Macdonald ought to have taken the steps I have outlined above, but he did not.

Mr Macdonald unique contraventions

2585 Two unique contraventions need to be addressed in respect to Mr Macdonald: (a) the NAW Projection Information; and (b) the Betta Homes No Financial Benefit Information.

2586 *First*, like with Mr Hunter, while I found Mr Macdonald knew some of the component parts making up the NAW Projection Information, I was not satisfied he was aware this information was material: see [2053]. The evidence reveals that Mr Macdonald had a limited engagement in the drafting of the First and Second ASX announcements (see [749]–[762], [772]–[776], [783]–[792]), and that it was Mr Hunter who proposed the NAW Transaction Projection: see [750]. Furthermore, while Mr Macdonald commented on the draft announcement, a director in his position acting reasonably would have been given comfort as to the figures by reason of the fact that Mr McCollum, the person best placed to know the accuracy of the projections, had not once, but twice, after being asked to "review" the announcement, and that this may have been viewed as indicating that he was content with its contents: see [750]–[753], [759]–[761] and [762]. In all the circumstances, while I accept the figure that appeared in the First and Second NAW Announcements should have been regarded as silly, I have not reached the level of satisfaction to conclude Mr Macdonald contravened s 180(1) in respect of the NAW Projection Information.

2587 *Secondly*, while I was satisfied that Mr Macdonald was aware of the Betta Homes No Financial Benefit Information (see [1560]–[1561]), I was not satisfied that he knew this information to be material: see [2065]. This is one of the anomalies I made reference to above. Although subjectively Mr Macdonald did not think this information was material, I am satisfied that, objectively, an ordinary person with the knowledge and experience of Mr Macdonald would have reasonably foreseen that his conduct in not providing an update as to the Betta Homes Agreement, might harm GetSwift's interests by exposing it to the risk of legal proceedings for contraventions of the *Corporations Act*, legal costs and penalties. The evidence reveals that Mr Macdonald was the key negotiator of the Betta Homes Agreement and new intricately of its terms: see [644]–[664]. He was also involved in the drafting and approval of the Fantastic Furniture and Betta Homes Announcement, which was released on 23 August 2017: [613]–[620]. Further, Mr Macdonald remained the main GetSwift contact overseeing the integration with Shippit. Following the announcement, between August 2017 and January 2018, Mr Macdonald engaged in telephone calls, and responded to (and was copied into) a plethora of email communication concerning the status of Shippit's integration with the GetSwift platform

(see [672]–[681]), including, notably, an email which said that "they've delayed the go live until next year because of xmas period": see [678].

2588 As of 23 January 2018, this integration had not been completed and no further contact had been received: see [684]. This was five months after GetSwift had announced an "exclusive commercial multi-year agreements with BETTA Home Living"; at this point in time, the market would have been under the impression that a trial period or proof of concept had already taken place, and that the Betta Homes Agreement would be generating revenue. As the director with primary carriage of the Betta Homes relationship, I am satisfied he ought to have known that not providing an update as to the Betta Homes Agreement might harm GetSwift's interests by exposing it to the risk of legal proceedings, legal costs and penalties.

The PwC Report

2589 For completeness, I should revisit the engagement of PwC. I have already dealt with this issue at a general level (see [1933]–[1939]) and in the context of the accessorial liability case against Mr Macdonald (see [2073]–[2074]). It suffices to simply note here that I am not satisfied that the mere fact of the engagement of PwC, or that Ms Reid sent a copy of Mr Macdonald's 19 February 2018 letter to the ASX, is of significance.

Mr Macdonald s 180(1) conclusions

2590 I am satisfied that, subject to the qualifications I have outlined, Mr Macdonald caused or permitted GetSwift to contravene ss 674(2) and 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* in circumstances where it was reasonably foreseeable that engaging in the conduct referred to might harm the interests of the company by exposing GetSwift to the risk of legal proceedings, legal costs and penalties. Mr Macdonald also failed to take reasonable steps to mitigate the Announcement Risks, thereby exposing GetSwift to the risk of legal proceedings, legal costs and penalties.

J.3.3 *Mr Eagle*

2591 The position with respect to Mr Eagle is a little more complex. Mr Eagle had a limited latitude to call the shots, was often micromanaged in relation to client agreements and his input on ASX announcements was an optional extra.

2592 I have found above that Mr Eagle was knowingly involved in three of GetSwift's s 674(2) contraventions, namely with respect to: (a) the Fruit Box Agreement Information; (b) the Fruit Box Termination Information; and (c) the NAW Agreement Information (collectively, the

Eagle accessorial liability contraventions). No case was brought against Mr Eagle for personally making misleading and deceptive representations, and no findings have been made to such effect. It is first convenient to address briefly those contraventions I found Mr Eagle was knowingly involved in, before turning to those that remain.

Did Mr Eagle breach s 180(1)?

2593 I am amply satisfied that Mr Eagle failed to exercise care and diligence in causing or permitting GetSwift to contravene s 674(2) of the *Corporations Act* in respect of the Fruit Box Agreement Information and the Fruit Box Termination Information.

2594 Mr Eagle argues that he was only asked to comment on the announcement initially in his capacity as a non-executive director, that he reviewed the announcement "carefully" and provided comments as appropriate, and given that he did not have knowledge of the contents of the announcement, there was little more that he could, or should, have done.[2985] Indeed, he says that there was no reason or requirement for Mr Eagle, as a non-executive director, to ask for the Fruit Box Agreement when reviewing the Fruit Box Announcement, particularly given that other members of the board had been directly dealing with Fruit Box and the management of that commercial relationship.[2986] This submission is not to the point. The contravention alleged by ASIC against Mr Eagle commences on 27 February 2017, and for good reason.

2595 Indeed, prior to 27 February 2017, as I have found above (at [166]), Mr Eagle had limited (if any) involvement with Fruit Box. He first became involved when he was circulated a draft of the Fruit Box Announcement on 23 February 2017, the night before it was released to the ASX: see [165]. Although Mr Eagle did provide comments, including one comment as to the calculation of the number of deliveries per year (see [165]), there is no evidence he had seen the Fruit Box Agreement by this stage. This is further indicated by his comments identifying superficial and grammatical errors only: see [165]. I accept this demonstrates Mr Eagle's had no involvement in the underlying commercial transaction with Fruit Box and that he had no communications or dealings with Fruit Box personnel about the Fruit Box Agreement.[2987] I

[2985] ECS at [193]–[195].
[2986] ECS at [195].
[2987] ECS at [164].

also accept, contrary to ASIC's submissions, there is no evidence that Mr Eagle knew that the Fruit Box Announcement had been marked price sensitive (he was not party to the instructions issued by Mr Hunter to Mr Mison (see [164]) or by Mr Macdonald to Mr Mison (see [169]) and there is no reference to marking the announcement price sensitive in the email exchange in which Mr Eagle provided his comments to Mr Mison (see [165]) or in the confirmation Mr Mison circulated to the directors of GetSwift by email (see [171])).[2988] However, on 24 February 2017, Mr Eagle received Mr Hunter's email that the Fruit Box Announcement had added $3.8 million to GetSwift's market capitalisation: see [1817].

2596 The evidence, however, does not stop there. While, as I said above, I am hesitant to infer that Mr Eagle simply receiving a copy of the Fruit Box Agreement on 20 March 2017 would have evidenced that the Fruit Box Agreement Information had been omitted and was material, given there is no evidence that he had previously been involved with the Fruit Box Agreement in any way, the content of Mr Halphen's email which was forwarded to him on the same day could not have been clearer: "Joel. You still need to address your misleading statement and how you are going to rectify it. *No contract for 3 years has been entered into as it is conditional on a trial. That is a material omission*" (emphasis added): see [187]–[188]. This is compounded by the fact that at the board meeting on 27 March 2017, the issue of the Fruit Box Announcement and Fruit Box's response appears to have been front and centre: see [195]–[197].

2597 Mr Eagle's main defence to why he did not breach his duties to act with due care and diligence is twofold. *First*, it is said that the evidence reveals Mr Hunter, as the chairman, decided to "own" the announcement,[2989] and as a non-executive director who had no contact with Fruit Box, the Court should be satisfied that Mr Eagle did not follow up on the Fruit Box Termination Information because he assumed Mr Hunter owned it and took responsibility for it, and had dealt with it.[2990] *Secondly*, Mr Eagle in effect says well, Ms Gordon was in the same position, if not more of a culpable position than him (given she had some involvement with Fruit Box) and ASIC makes no complaint about the behaviour of Ms Gordon.[2991]

[2988] ACS at [1600], and [1665].
[2989] ECS at [195].
[2990] ECS at [197].
[2991] ECS at [196]–[197].

2598 These contentions should be rejected.

2599 *First*, while it is true that in some circumstances it may be reasonable for a director to rely on others to discharge particular functions (see *ASIC v Healey* (at 330 [167]), and that a non-executive director *may* rely on management and other officers to a greater extent than an executive director (see *Morley* at 355 [807]), one cannot hide from reality by reason of the fact that someone has put their hand up to deal with a matter. Indeed, in considering the reasonableness of the reliance, a number of factors are of importance, including: (a) the extent to which the director is put on inquiry, or given the facts of a case, should have been put on inquiry; (b) the risk involved in the transaction and the nature of the transaction; and (c) the extent of steps taken by the director, for example, inquiries made or other circumstances engendering "trust": see *Adler* (at [372]).

2600 While I accept that Mr Eagle, as a non-executive director, had a lesser involvement in the negotiation of client agreements and input of ASX announcements (as Fruit Box demonstrates), this is one of the clearest examples where he had been put on notice that something was seriously wrong. The email of Mr Halphen dated 20 March 2017, which was forwarded to him, was pellucid in its terms (see [187]–[188]): it made plain that there was information omitted from the announcement, conveying, quite directly, the substance of what is asserted by the Fruit Box Agreement Information, and that this was thought by the client to be material. Immediately, this should have rung alarm bells in a director's mind, particularly one who was a solicitor.

2601 It is within this context that one must view the circumstances of the board meeting of 27 March 2017 and Mr Hunter's email that follows. The evidence reveals heated discussion at the board meeting, where it was clearly recognised that the issue of the termination was of significance. This is evident by Ms Gordon conscientiously raising the need to communicate to the market, and Mr Hunter's grudging acceptance of this point. Indeed, the significance of the state of affairs was confirmed by Mr Hunter's email later that day, which attached a copy of a draft announcement entitled "Fruit Box declines to proceed with GetSwift" and which noted that he recognised that "Just in case Box is actually serious about terminating the contract and not trying to get better commercial terms we need to send out the notification to the ASX as part of the continuous disclosure rules", noting that "we should put out forthright *[sic]* if its confirmed": see [198].

2602 When the evidence is viewed as a whole, any reasonable director in the position of Mr Eagle would have understood and appreciated the significance of the termination, known that GetSwift was currently in breach of its continuous disclosure obligations, and should have taken steps to ensure the disclosure was actually made.

2603 *Secondly*, any attempt to rely on the fact that no complaint has been made in respect of the conduct of Ms Gordon is irrelevant. No such case is advanced by ASIC (understandably when one has regard to everything that happened within GetSwift); but irrespective as to what others ought to have done, what matters is what a director in the position of Mr Eagle ought to have done.

2604 Furthermore, in respect of the ***NAW Agreement Execution Information***, I am satisfied that even if I am wrong in relation to the accessorial liability case against Mr Eagle, in failing to take steps to ensure the First NAW Announcement was released to the market in a timely fashion, he contravened s 180(1) of the *Corporations Act*. I have found that Mr Eagle was aware of the NAW Agreement Execution Information on 18 August 2017: see [1586]–[1587]. That is, almost a month before the First NAW Announcement was made. With knowledge as to GetSwift's continuous disclosure obligations, a reasonable director in his position would have appreciated the risk of not announcing a client agreement of such scale to the market. Even if I am wrong to conclude Mr Eagle knew of the First NAW Announcement as of 18 August 2017, and his knowledge instead is to be traced to his receipt of a copy of the first NAW Announcement on 5 September 2017 (see [775]), I am still satisfied that he breached s 180(1). The passage of seven days following the receipt of "highly sensitive" agreement should have raised significant questions in the mind of a director, particularly given the evidence reveals Mr Eagle engaged with the announcement on 18 August 2017, at which time the details of the NAW Agreement Execution Information do not appear on the evidence to have been contested. Mr Eagle took no steps to ensure the disclosure of this information.

2605 The remaining contraventions relate to: (a) the Pizza Pan Agreement Information; (b) the Betta Homes Agreement Information; (c) the NAW Projection Information; (d) the Yum MSA information; and (e) the Amazon MSA Information.

2606 *First*, in respect of the ***Pizza Pan Agreement***, I have not reached the level of satisfaction to conclude that Mr Eagle contravened s 180(1). The evidence does not appear to indicate that he was involved in any of the commercial negotiations with Pizza Hut. Further, it reveals that while Mr Eagle was involved in the drafting of the Pizza Pan Agreement, his role was minimal

and compartmentalised. For example, Mr Eagle was asked by Mr Macdonald to consider certain comments and contractual issues as specifically identified: see [405]. While he was copied into some further communication concerning the term sheet (see [406]–[407]), when it came to the Pizza Hut Announcement, his involvement was also limited. In what was developing as usual practice, he was asked to "review" the announcement, which he did, recommending the removal of the term "multi-year": see [419]. These comments were not incorporated: see [428]. I am not satisfied that Mr Eagle, who was given a limited chance to comment on the announcement, contravened s 180(1), particularly given his comments sought to remove what must be inferred to be what he thought was a potentially misleading statement.

2607 *Secondly*, the ***Betta Homes Agreement Information*** with respect to Mr Eagle raises issues of some complexity. I have found above that while Mr Eagle was aware of the Betta Homes Agreement Information (at [1549]–[1550]), I was not satisfied he knew this information to be material: see [2085]–[2086]. That was principally because, while Mr Eagle's involvement in the Fantastic Furniture and Betta Homes Announcement is virtually non-existent: see [611]–[621], [669]–[670]. Indeed, as Mr Eagle submitted quite forcefully, he was not even in the country when the announcement was being negotiated, and landed only two hours before it was released (see [661], [1543]–[1546]), all of which was information the other directors' knew: see [666]. Moreover, I found that while Mr Eagle was heavily engaged in talks with the ASX immediately following the release of the announcement due to it not being marked as price sensitive, his negotiations with the ASX were largely operational, raising an oversight by MAO: see [1944]–[1952]. In these circumstances, while he *should* have known that it omitted material information, I was not satisfied to the requisite level to conclude that he did.

2608 But the difference between the subjective and the objective is brought into sharp focus in respect of the s 180(1) inquiry. Here, I do not have to satisfy myself that he knew the omitted information was material. Mr Eagle submits there is nothing in the evidence to demonstrate that there was any occasion for a non-executive director in the position of Mr Eagle to take any further action in relation to the Betta Homes Agreement Information following the announcement on 23 August 2017.[2992] I disagree. When the whole of the evidence is considered, I am satisfied a reasonable director in Mr Eagle's position and with his knowledge

[2992] ECS at [283].

ought to have known that Betta homes Announcement omitted material information. Mr Eagle had a significant involvement in the drafting of Betta Homes Agreement: see [655]–[660]. Further, while he was on an aeroplane when the drafts of the announcement were circulated, and was given practically no chance to raise an objection, he arrived just in time for the uproar that the announcement had not been marked as price sensitive. It is wholly unrealistic to think that Mr Eagle's did not have to understand the detail of what was contained in the Fantastic Furniture and Betta Homes Announcement in the light of the commotion (and the absence of any evidence to the contrary). What a reasonable director in Mr Eagle's position would have discovered, given they had assisted in drafting the agreement (see [655]–[660]), they knew of their continuous disclosure obligations, and was aware of the First and Second Agreement After Trial Representations, was that the picture painted by the announcement omitted critical information, pivotally that there was a trial period of two months (the commencement of which was conditional upon agreement that the software was operating effectively) and that Betta Homes actually had to elect to opt in to the 18-month term following the two-month trial period. Mr Eagle ought to have known that this important omission had the potential to harm GetSwift's interests by exposing it to the risk of legal proceedings for contraventions of the *Corporations Act*, legal costs and penalties. No steps were taken to address this.

2609 *Thirdly*, in respect of the ***NAW Projection Information***, I am not satisfied Mr Eagle contravened s 180(1). The evidence reveals too little engagement and too little knowledge on his part. While I accept he reviewed and advised on the terms of the NAW Agreement (see [741]–[746]) and reviewed the First and Second NAW Announcements, his involvement was relatively insignificant. Further, the factual circumstances of which he was aware and ought to have been aware of are simply too tangential to conclude that a reasonable director in his position ought to have detected an issue and done something about it. I am therefore not satisfied Mr Eagle contravened s 180(1) with respect to the NA Williams Projection Information.

2610 *Fourthly*, Mr Eagle's involvement begins to shift when one turns to the ***Yum MSA Information*** and ***Yum Projection Information***. As I have outlined in more depth above (see [2087]–[2090], [2095]), the evidence reveals Mr Eagle was substantially involved with the drafting of the Yum MSA and engaged directly with Yum's legal counsel: see [882]–[884] and [887]–[892]. Mr Eagle submits that he did exercise due care and diligence by reviewing the draft Yum Announcement and providing his comments to Messrs Hunter and Macdonald who did not include his comments in the final version of the Yum Announcement. The fact of his input is

correct, but the substance of this submission is a mischaracterisation of the evidence. The evidence reveals that Mr Eagle was circulated the draft ASX announcement for Yum earlier than was usual (see [905]) and made substantial changes and suggestions: see [902]–[903], including noting that:

> I think in this particular announcement **being a little bit legalistic has a powerful impact** – see my language making clear up front that this agreement covers not just the ownership/affiliated chain of companies but **also the franchisees, licensees and joint ventures – in the US and internationally.** The language is lifted straight from our contract! [2993]

2611 Mr Eagle's comments were not like those in respect of Pizza Pan, toning down potentially misleading comments; rather they were to ramp up the "powerful impact" of the Yum announcement. Although these changes were not included (see [906]), this email reveals Mr Eagle well across the terms of the Yum MSA, what was being presented by the Yum Announcement, and the influence that the Yum Announcement could have on the market.

2612 I accept that in response to a complaint received by the ASX on 8 December 2017 (see [925]) Mr Eagle responded in the negative when asked whether the Yum MSA is subject to "any other material conditions" not contained in the Yum Announcement: see [926]. However, the test to determine a contravention of s 180(1) is objective. To my mind, a reasonable director in the position of Mr Eagle, with knowledge of GetSwift's Prospectus, Continuous Disclosure Policy, and what was presented to the market in the April Appendix 4C, the May Investor Presentation, the October Appendix 4C and the Key Partnerships Announcement (that is, the First and Second Agreement After Trial Representations and the Quantifiable Announcements Representations), ought to have known the Yum Announcement mischaracterised the terms of the Yum MSA. In all the circumstances, I am satisfied Mr Eagle ought to have known that Yum Announcement omitted material information, with the potential to harm GetSwift's interests by exposing it to the risk of legal proceedings, legal costs and penalties.

2613 *Fifthly*, I am not satisfied that Mr Eagle breached his duties of care and diligence in respect of the ***Amazon MSA Information***. As I outlined above in respect of accessorial liability (see [2091]), I accept that Mr Eagle had a heavier than usual involvement in the drafting and negotiation of the Amazon MSA and communicated directly with personnel from Amazon: see

[2993] SWI00019038_UR (emphasis added).

[971]–[973], [975], [979]–[980]. I also accept that I have found Mr Eagle was aware of the Amazon MSA information by reason of his involvement: see [1755]. But when it comes to the content of the announcement, Mr Eagle's role is far more limited: see [896]–[912], [2091]. Further, after the ASX suspended GetSwift's shares from trading, Mr Eagle took a number of steps that appear to be reasonable in the circumstances: (a) he arranged a meeting with the ASX to discuss the ASX's issues with the First Amazon Announcement; (b) he retained the services of Mr Halstead of Clayton Utz, to assist; and (c) Mr Eagle prepared the Second Amazon Announcement which incorporated comments from the ASX, and was released with the approval of ASX personnel: see [1008]–[1017]. There is no complaint about any breach beyond the time of the Second Amazon Announcement. I am therefore not satisfied that Mr Eagle contravened s 180(1) in respect of the Amazon.

Mr Eagle s 180(1) conclusions

2614 I am satisfied that, subject to the qualifications I have outlined, Mr Eagle caused or permitted GetSwift to contravene s 674(2) of the *Corporations Act* in circumstances where it was reasonably foreseeable that engaging in the conduct referred to might harm the interests of the company by exposing GetSwift to the risk of legal proceedings for contraventions of the *Corporations Act*, legal costs and penalties.

K CONCLUSION AND ORDERS

2615 ASIC is entitled to declaratory relief against GetSwift, Mr Hunter, Mr Macdonald and Mr Eagle as indicated in these reasons. In framing proposed declarations, however, ASIC should be mindful of the admonition of Gray J as to the "fetish", as his Honour described it, of certain regulators seeking, and the Court granting, declaratory relief simply because the Court finds that a contravention has occurred: *Australian Competition and Consumer Commission v Francis* [2004] FCA 487; (2004) 142 FCR 1 (at 36 [110]). As a general proposition, there is little point in declaratory relief if it has no impact on the penalty. As I said in *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; (2020) 377 ALR 55 (at 94 [151]), the "reality is that both the Court's disapproval of contravening conduct and clarification of the law is much more likely to emerge from a perusal of reasons than the bare terms of essentially repetitive declarations".

2616 The parties are to file an agreed minute or competing minutes of order reflecting these reasons.

2617 I cannot conclude, however, without remarking upon two matters. *First*, is that the vast scope and highly repetitive nature of the ASIC case has placed significant demands on the Court in resolving this case in a timely fashion. My preliminary view is that costs should follow the event against each of the defendants, but I will receive any oral submissions on costs generally and, in particular, as to whether costs should be recovered by ASIC in relation to the misleading and deceptive conduct case (which always seemed to me to be an exercise in supererogation). *Secondly*, despite my scepticism as to whether a case of this scope was necessary in order to achieve the relevant regulatory purpose, those acting on ASIC's instructions (and all those acting for each of the defendants) conducted the case at trial with great efficiency, courtesy and professionalism, which has been of assistance in marshalling the material and preparing these reasons.

2618 At the case management hearing I will also hear submissions about the future progress of the balance of the proceeding. In this regard, it is worth mentioning one further matter in advance of that hearing: the second further amended originating application not only seeks orders for the imposition of pecuniary penalties against all defendants, but also orders pursuant to s 206C(1) and/or s 206E(1) of the *Corporations Act* disqualifying Messrs Hunter, Macdonald and Eagle (prayers 13, 22 and 29) from managing corporations for a period to be determined by the Court. Given the differing findings I have made as to the individual defendants, and the relocation of GetSwift (and, for all I know, possibly some directors) to another jurisdiction after I was reserved (see [3]), ASIC should provide, prior to the case management hearing, a version of a third further amended originating application which specifies, with particularity, the penal orders it now seeks against each of the contraveners.

I certify that the preceding two-thousand-six-hundred-and-eighteen paragraphs (2618) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate: 

Dated: 10 October 2021

ANNEXURE – TRADING VOLUME DATA

				VOLUME - 9 December 2016 to day preceding the Announcement				VOLUME - 24 February 2017 to 19 February 2018			
Announcement	Date	Time Announce-ment Released	Volume on day of Announce-ment	Average volume from 9 Dec 16 to day preceding Announcement	Median Volume from 9 Dec 16 to day preceding Announce-ment	Percentage movement from preceding Ave Vol	Percentage movement from preceding Median Vol	Average volume for period (24 Feb 17 to 19 Feb 18)	Median volume for period (24 Feb 17 to 19 Feb 18)	Percentage movement from period Ave Vol	Percentage movement from period Med Vol
FruitBox	24-Feb-17	9:29:42	81,587	123,987	38,500	-34.2%	111.9%	736,105	488,837	-89%	-83%
CBA	4-Apr-17	8:26:33	2,230,762	121,390	52,633	1737.7%	4138.3%	736,105	488,837	203%	356%
Pizza Hut	28-Apr-17	13:28:51	539,027	164,419	77,700	227.8%	593.7%	736,105	488,837	-27%	10%
All Purpose Trans	8-May-17	11:08:11	160,259	161,049	75,110	-1.1%	113.4%	736,105	488,837	-78%	-67%
CITO Transport	22-May-17	9:58:53	304,766	166,065	80,750	83.5%	277.4%	736,105	488,837	-59%	-38%
Hungry Harvest	1-Jun-17	9:28:47	117,471	164,091	77,700	-28.4%	51.2%	736,105	488,837	-84%	-76%
Betta & Fantastic	23-Aug-17	10:20:43	520,664	288,871	135,637	80.2%	283.9%	736,105	488,837	-29%	7%
Bareburger	30-Aug-17	9:36:38	308,064	292,354	146,664.5	5.4%	110.0%	736,105	488,837	-58%	-37%
NA Williams	12-Sep-17	9:05:18	5,758,739	332,539	160,320	1631.7%	3492.0%	736,105	488,837	682%	1078%
Johnny Rockets	25-Oct-17	11:48:14	987,445	514,887	262,711.5	91.8%	275.9%	736,105	488,837	34%	102%
YUM! Brands	1-Dec-17	9:56:11	2,246,254	541,495	349,853.5	314.8%	542.1%	736,105	488,837	205%	360%
Amazon	1-Dec-17	10:01:11									
	4-Dec-17		5,828,108	541,495	349,853.5	976.3%	1565.9%				
	1&4/12/2017		8,074,362	541,495	349,853.5	1391.1%	2207.9%				
Notes:											
Data for the calculations extracted from GSW.0003.0005.0325 – SCD-7 Dent Affidavit (GSW.0009.0039.0001)											

VALUE - 9 December 2016 to day preceding the Announcement					TRANSACTIONS - 9 December 2016 to day preceding the Announcement				
Value on day of Announce-ment	Average VALUE from 9 Dec 16 to day preceding Announce ment	Median VALUE from 9 Dec 16 to day preceding Announce-ment	Percentage movement from preceding Ave Value	Percentage movement from preceding Median Value	TRANS on day of Announce-ment	Average TRANS from 9 Dec 16 to day preceding Announce ment	Median TRANS from 9 Dec 16 to day preceding Announce-ment	Percentage movement from preceding Ave Trans	Percentage movement from preceding Median Trans
$ 37,745	$ 39,033	$ 13,358	-3.3%	182.6%	9	9	4	0.0%	125.0%
$ 1,533,359	$ 46,314	$ 23,187	3210.8%	6513.0%	436	10	6	4112.6%	7166.7%
$ 317,856	$ 83,010	$ 31,879	282.9%	897.1%	88	20	8	336.1%	1000.0%
$ 101,559	$ 81,875	$ 29,248	24.0%	247.2%	26	20	8	28.8%	225.0%
$ 257,908	$ 89,222	$ 32,511	189.1%	693.3%	51	22	8	133.4%	537.5%
$ 99,569	$ 91,072	$ 37,745	9.3%	163.8%	29	22	10	30.5%	190.0%
$ 536,368	$ 239,740	$ 79,289	123.7%	576.5%	206	75	17	174.0%	1111.8%
$ 319,610	$ 244,791	$ 81,101	30.6%	294.1%	149	80	22.5	85.8%	562.2%
$ 11,843,623	$ 307,222	$ 99,569	3755.1%	11794.9%	3,430	103	26	3222.8%	13092.3%
$ 2,624,815	$ 805,853	$ 173,193	226.0%	1415.5%	836	281	42.5	197.5%	1867.1%
$ 8,515,821	$ 903,729	$ 250,422	842.3%	3300.6%	1,017	329	80	209.2%	1171.3%
$ 24,591,336	$ 903,729	$ 250,422	2621.1%	9720.0%	4,871	329	80	1381.2%	5988.8%
$ 33,107,157	$ 903,729	$ 250,422	3563.4%	13120.5%	5,888	329	80	1690.4%	7260.0%