

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

No. S168 of 2012

BETWEEN

**ARISTOCRAT TECHNOLOGIES AUSTRALIA
PTY LTD (ACN 001 660 715)**
First Applicant

**ARISTOCRAT INTERNATIONAL
PTY LTD (ACN 000 148 158)**
Second Applicant

ARISTOCRAT TECHNOLOGIES INC
Third Applicant

- AND -

**GLOBAL GAMING SUPPLIES PTY LTD
(ACN 008 548 589)**
First Respondent

ANTHONY EDWARD ANDREWS
Second Respondent

**IMPACT GAMING PTY LTD
(ACN 109 299 461)**
Third Respondent

FRANCIS GEORGE BERNARD CRAGEN
Fourth Respondent



No. S169 of 2012

BETWEEN

**ARISTOCRAT TECHNOLOGIES AUSTRALIA
PTY LTD (ACN 001 660 715)**
First Applicant

**ARISTOCRAT INTERNATIONAL
PTY LTD (ACN 000 148 158)**
Second Applicant

ARISTOCRAT TECHNOLOGIES INC
Third Applicant

- AND -

RIAD ALLAM
First Respondent

**GLOBAL GAMING SUPPLIES PTY LTD
(ACN 008 548 589)**
Second Respondent

ANTHONY EDWARD ANDREWS
Third Respondent

**IMPACT GAMING PTY LTD
(ACN 109 299 461)**
Fourth Respondent

FRANCIS GEORGE BERNARD CRAGEN
Fifth Respondent

**TONITA ENTERPRISE PTY LTD
(ACN 120 737 402)**
Sixth Respondent

**APPELLANTS/APPLICANTS' SUBMISSIONS IN REPLY ON NOTICES OF APPEAL
AND IN ANSWER ON PROPOSED NOTICES OF CONTENTION**

1. The appellants/applicants (**Aristocrat**) certify that this submission is in a form suitable for publication on the internet.

Reply on Amended Draft Notices of Appeal

Matter not argued below/ Interests of justice

2. Contrary to the respondents' submissions (cf **GSA**¹ paras 13 to 18 and **TSA**² paras 34 to 39) the Aristocrat argument has not altered. As previously submitted,³ the Full Court correctly recorded: "*The Aristocrat parties invited the Court to infer that these transactions represented dealings made in infringement of s 38 of the Copyright Act*" (AJ[266]).
- 10 3. As previously submitted,⁴ the process of reasoning advanced and accepted by the primary judge, and the Full Court, was that the transactions were copyright infringing transactions because, in the case of the DN (duplicate number) transactions, the Global/Impact parties were purporting to sell the same "genuine" machine twice. In the case of the MC (machines in clubs) transactions, the Global/Impact sales must have been of counterfeit machines because the genuine machines were in clubs. Further, as previously submitted both the primary judge and the Full Court accepted that there would be no reason to use fake serial numbers if the copy of the Aristocrat software in the machines was genuine.⁵
- 20 4. The explanations sought to be given by the respondents' witnesses were not that they did not appreciate that they were including those numbers in the invoices, but in substance that there were no duplicate transactions or that the evidence as to the genuine machines in the clubs should not be accepted. All of those explanations were rejected including on credit grounds which involved a proper use of the emails. The emails were important for that purpose and it was accepted by the Full Court that they were legitimately used for that purpose.
5. It was only the distraction of the irrelevant "tendency" consideration which appears to have deflected the Full Court from arriving at exactly the same conclusion as the trial judge for exactly the same reasons on the same arguments. There is no new case.
- 30 6. To the extent that Aristocrat advances additional submissions in relation to s. 97, it is only to demonstrate that the infection of the reasoning process by considerations of tendency could not be correct.

Concurrent findings

7. The respondents' submissions that there were no concurrent findings (see GSA paras 19 to 22 and TSA paras 40 to 42) on the basis they were conditioned on the assumption that the primary judge had correctly used the emails for the knowledge element, overlooks the fact that the concurrent findings were as to the fact that the transactions were transactions of unauthorised copies of Aristocrat software, that

¹ Respondents' Submissions (S168/2012)/Second, Third, Fourth and Fifth Respondents' Submissions (S169/2012) dated 1 February 2013.

² First and Sixth Respondents' Submissions (S169/2012) dated 1 February 2013.

³ Appellants'/Applicants' Submissions dated 21 December 2012 (S168/2012 and S169/2012) (**AS**) para 38.

⁴ AS paras 18 to 37.

⁵ AS paras 38 to 40.

the explanations put forward by the respondents were correctly rejected and necessarily that the fake numbers had been knowingly used.

8. As submitted at AS para 71, the Full Court made it clear that the purported misuse by the trial judge of the emails related only to the "knowledge" requirement as indicated in AJ[248]: *"On the assumption that the primary judge was correct in using the emails in the way he did in making the findings represented by the third, fourth and fifth "essential" propositions (such that the "knowledge" requirement of s.38 of the Copyright Act was established), and in deference to the substantial arguments of the parties, we proceed to consider and determine the remaining issues on appeal"*.
9. The findings of the primary judge concerning the counterfeit transactions were the subject of separate grounds of appeal that were determined adversely to the respondents by the Full Court. The Full Court affirmed those findings unconditionally, albeit it was not satisfied in relation to the "knowledge" element.

Section 136 rulings

10. The Full Court's findings in this regard are not the subject of challenge by Aristocrat in this appeal because they were not material to the Full Court's conclusion that the knowledge element of s. 38 of the Copyright Act had not been satisfied. That conclusion, and Aristocrat's appeal, turns on the treatment of the emails under s. 97 of the Evidence Act and their admissibility in support of knowledge under s.38 of the Copyright Act. It was only by reason of the Full Court's ruling on s. 97 that the emails were excluded for the purposes of s. 38 of the Copyright Act, and the Full Court ultimately did not employ its *obiter* comments regarding s. 136 in reaching its conclusions on knowledge. Far from the rulings under s. 136 of the Evidence Act fatally impugning the findings of "counterfeiting" (GSA para 28) they were unaffected by the s. 136 ruling insofar as they were admitted against Global/Impact, as were the invoices.
11. Further, it is not correct to say that Aristocrat's case against Global and Impact depended fundamentally on the findings of manufacture of fake components by Tonita, or the physical materials found at Tonita's premises (see GSA paras 23 and 24). As the process of reasoning in relation to the impugned transactions indicates, there was no mention of such material in the DN and MC analysis either by the primary judge or the Full Court. In any event, not that it is ultimately material, the primary judge also relied upon materials directly relating to the Impact respondents, including the presence of blank compliance plates at the Botany premises (see AJ [68]), a location at which Mr Allam carried on business, undertook refurbishment work on behalf of the joint venture and acted as a contact point for the receipt of materials (PJ [99], [149] and AJ [29], [32]).
12. There is an obvious tension between the submissions of the Global respondents and the Tonita respondents on the relevance and import of the s. 136 rulings. The Tonita respondents' submission that Mr Allam could not have obtained the requisite knowledge from the Global/Impact documents the subject of the s. 136 ruling fails to acknowledge the findings concerning Mr Allam's involvement with the Global/Impact business. As recognised by the primary judge and the Full Court, Mr Allam was found to have "carried out significant technical work and business functions for the joint venture" and was referred to by Mr Andrews as the joint venture's "technical guy" and "main guy" (PJ [150]; AJ [6], [27]). Further, as

submitted at AS paras 44 and 45, the Full Court upheld findings that Mr Allam burned Aristocrat game software onto blank EPROMs (PJ[718]; AJ[123]) and that *“the totality of the circumstances justify the conclusion that, in relation to [the impugned] transactions, the impugned gaming machines contained Aristocrat game software that had been reproduced by the Allam parties, specifically Mr Allam”* (AJ[133]). Those findings were independent of the Full Court’s concern in relation to the use of the emails and independent of any issue in relation to s. 136.

The Emails

- 10 13. The respondents’ submissions fail to answer the fundamental problem presented by the Full Court’s decision to dismiss the dealing case under s. 38 of the Copyright Act. The foundations for the finding that machines sold by Global/Impact were counterfeit were the machine number comparisons previously described, which were independent of the emails, the proposition that there was no reason to select fake numbers for genuine machines, again a process of reasoning independent of the emails, and a rejection of the explanations put forward by the deponents in part by accepted legitimate use of the emails.⁶ The finding that Mr Andrews selected fake numbers was a corollary of the rejection of his explanations.⁷
- 20 14. Those findings, which were based on the Global/Impact invoices themselves and Mr Andrews’ unsuccessful attempts to explain the conflict presented by those invoices, necessarily meant that Mr Andrews and Global and Impact as the issuers of the relevant invoices, knew that the machines in question were infringing. That was the only available finding on knowledge. The only part that the emails played in this reasoning were as the means by which Mr Andrews’ denials were rejected, which it is common ground was a permissible use of the emails. The respondents cannot explain how such an inevitable finding would not arise, nor is there any circularity in such a reasoning process (cf GSA para 29.3). The Full Court fell into error in failing to find infringement in these circumstances.
- 30 15. In particular, the respondents never sought to lead evidence to the effect that they were unaware of their own records or their significance. The suggestion that the Global respondents’ records were so vast that they could not be invested with the requisite knowledge (GSA para 29.1 and 29.2) is an argument not advanced at trial and would have required evidence. At trial the respondents took a different forensic course, namely to assert positively that each transaction was genuine.

Answer on Proposed Notices of Contention

- 40 16. Related to the foregoing submission is the respondents’ suggestion pursuant to the proposed notices of contention that there might have been innocent reasons for using fake serial numbers (GSA [37.6], [37.7]). That is a matter which quintessentially needed to be addressed by evidence. Specifically, the respondents never sought to lead evidence to the effect that they selected fake serial numbers for some innocent reason. Their case was that the numbers were not fake. When that failed, there was only ever one available conclusion on s. 38. Evidence that they deliberately used fake serial numbers in relation to “genuine” software for “innocent” reasons, would have posed entertaining forensic challenges for the respondents.

⁶ AJ [131] last sentence.

⁷ AJ [305].

17. Further, that contention along with the other grounds in the draft notices of contention are largely a rerun of factual or procedural grounds in the notices of appeal below (eg, 17 of the 24 grounds in the Global respondents' draft notice, and the balance is comprised of largely related grounds). This reflects the fact that the respondents succeeded in the Full Court on a ground other than that relied upon by them; but for the s. 97 issue the respondents would have had to seek to vary or discharge the Full Court's judgment, and if Aristocrat succeeds with its application and appeal the respondents have foreshadowed, in their draft notices of contention, that that is precisely what they intend to do. Just as they sought to discharge the primary judge's decision on grounds unrelated to s. 97, the proposed notices of contention replicate this in this Court.
18. The Court would not lightly permit essentially the rerun of arguments directed to factual and procedural matters which were rejected by the primary judge and the Full Court. It is common ground that there is a substantial body of affidavit, oral and documentary evidence before the primary judge and the Full Court, and both the primary judge and the Full Court carefully considered that evidence in the course of rejection of the attack brought by the respondents against the factual findings below. The fact that the respondents urge the Court to undertake what essentially is the same set of factual enquiries misunderstands the nature of this Court's appellate function. It is sufficient basis to reject the proposed notices of contention.
19. In a number of respects the respondents impermissibly seek to cavil with findings made below. Repeated references to the existence or not of evidence that would support or undermine the concurrent findings of the Courts below illustrate the inappropriateness of the course urged on this Court by the respondents. Despite unchallenged credit findings against the Global and Impact respondents, they cavil with findings peculiarly available to be made by the primary judge about the weight to be afforded to the evidence of witnesses whose evidence was in conflict (eg, GSA para 37.1). Other submissions amount to no more than an invitation to this Court to speculate about matters which are in the face of conflicting, concurrent findings. No error on the part of the primary judge or the Full Court has been demonstrated in respect of those concurrent findings.
20. This is nowhere better illustrated than by what amounts to the third attempt by the respondents to reargue their defence of the DN and MC transactions. The findings of the primary judge and the Full Court in respect of those transactions depended upon an assessment of the evidence of witnesses called by Aristocrat (which was accepted both by the primary judge and the Full Court), Global and Impact's accounting records, and the denials of Mr Andrews. The unchallenged, adverse credit findings against Mr Andrews, and the rejection of his evidence which sought to explain away the inconsistencies in the transactions, is fatal to the respondents' attempts now to re-agitate whether those transactions were counterfeit. The Global respondents' submission concerning the source of the MC machines, being other than the Tonita parties, is not open because the Court disbelieved Mr Andrews' evidence.⁸
21. In any event, the Full Court's treatment of the issues raised in the proposed notices of contention is set out below:

⁸ AJ [352]-[353], [360], [362].

- (a) In relation to the contentions that the Full Court erred by upholding the primary judge's conclusion that the Global respondents had infringed the copyright of Aristocrat (and related contentions),⁹ no error in reasoning in the Full Court's findings at AJ [307]-[362] has been established;
- (b) In relation to the contentions that the Full Court erred by upholding the findings of the primary judge that the Global respondents had infringed Aristocrat's copyright by selling 42 machines within 5 transactions in the DN category,¹⁰ no error in reasoning in the Full Court's findings at AJ [307] has been established;
- 10 (c) In relation to the contentions that the Full Court erred by upholding the conclusions of the primary judge that the Global respondents has infringed Aristocrat's copyright by selling 16 machines within 4 transactions in the MC category,¹¹ no error in reasoning in the Full Court's findings at AJ [318]-[362] has been established;
- (d) In relation to the contentions that the Full Court erred by conclusion that the primary judge's decision to award additional damages against the Global respondents pursuant to s. 115(4) of the Copyright Act was not attended by error,¹² no error in reasoning in the Full Court's findings at AJ [404] has been established.
- 20 22. As for the Tonita respondents' additional contentions concerning the primary infringement findings made against Mr Allam, for the same reasons, such a factual re-investigation by this Court is inappropriate. The findings made by the primary judge and upheld by the Full Court against Mr Allam were based on a meticulous examination of the evidence concerning the content of the computers, Mr Allam's use of the computers and his extraordinary denials in the face of the overwhelming physical evidence. The adverse credit finding against him, which was affirmed by the Full Court, is fatal to Mr Allam's attempts to re-agitate the issue of his primary infringement of Aristocrat's copyright works. Finally, there are unchallenged findings (PJ [96], [903]; AJ [27]) that Mr Allam commenced his association with the
- 30 Global respondents in January 2003 (cf TSA paras 11 and 15).

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⁹ Global respondents' proposed notice of contention dated 21 December 2012, grounds 1 to 6.

¹⁰ Global respondents' proposed notice of contention dated 21 December 2012, grounds 7 to 18.

¹¹ Global respondents' proposed notice of contention dated 21 December 2012, grounds 19 to 21.

¹² Global respondents' proposed notice of contention dated 21 December 2012, grounds 22 to 24.