

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

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

No S168 of 2012

No S169 of 2012

BETWEEN

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**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

**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

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

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



RESPONDENTS' SUBMISSIONS (S168 of 2012)

**SECOND, THIRD, FOURTH AND FIFTH RESPONDENTS' SUBMISSIONS
(S169/2012)**

Part I: Suitable for publication

1. Global Gaming Supplies Pty Limited, Anthony Andrews, Impact Gaming Pty Limited and Francis Cragen (collectively, “**Global/Impact**”) certify that this submission is in a form suitable for publication on the internet.

Part II: Issues presented by the appeal and application for special leave

2. Whether it is in the interests of the administration of justice that the applicants/appellants (collectively, “**Aristocrat**”), having been refused leave by the Full Court of the Federal Court of Australia to reopen the appeal to that Court, so as to argue matters not previously argued at trial or on the appeal, should nevertheless be permitted to argue those same matters on further appeal to the High Court, without having appealed from or demonstrated error in the exercise of discretion by the Full Court.
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3. Whether findings of fact essential to Aristocrat’s appeal are “concurrent findings” as asserted.
4. Whether Aristocrat’s claims against Global/Impact can succeed in the absence of evidence the subject of rulings made by the primary judge pursuant to s. 136 of the *Evidence Act, 1995 (Cth)* (“**s. 136 Rulings**”), which evidence the Full Court held should not have been admitted.
5. Whether six email chains tendered by Aristocrat (“the **Emails**”) were admissible to establish Global/Impact’s knowledge for the purpose of s. 38 of the *Copyright Act, 1968 (Cth)* (“the **Act**”) and, if not, whether the evidence disclosed any other satisfactory basis for inferring that knowledge.
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6. Whether the Full Court, in making findings with respect to individual transactions (the “**Impugned Transactions**”) (upon the alternative hypothesis that the ‘knowledge’ requirement of s. 38 of the Act had been duly established), erred in the respects set out in Global/Impact’s proposed Notice of Contention.

Part III: *Judiciary Act 1903*

7. It is certified that the respondents have considered whether any notice should be given in compliance with s. 78B of the *Judiciary Act 1903*. In their view this is not necessary.

Part IV: Contested facts

8. Global/Impact accept Aristocrat's summary of the relevant facts, save for:

(a) the omission of the following significant matters:-

(i) Global/Impact conducted a substantial, legitimate business selling second-hand and refurbished genuine Aristocrat and other gaming machines (fitted with genuine parts, components and games), obtained from various industry sources;

(ii) Mr Allam and his company Tonita Enterprise Pty Ltd (collectively "Tonita") had contracts with a number of poker machine companies (including Global/Impact) for whom he undertook refurbishing and repair work;

10 (b) their recitation of findings made by the Full Court as to the Impugned Transactions as if they were final and unqualified, when in fact those findings were conditioned upon the assumption that the primary judge was correct in his approach to the evidence, which the Full Court held he was not.

Part V: Applicable provisions

9. Global/Impact accept the statement of applicable provisions in paragraphs 8-55 of the Appellants/Applicants' Submissions filed 21.12.12 ("Aristocrat's Submissions"), save that s. 136 of the *Evidence Act, 1995* (Cth) is also relevant.

Part VI: Argument in answer to the argument of the appellants

A. Introduction

20 10. Despite years of investigations and a series of *Anton Piller* raids by Aristocrat (identifying what were said to be some 3,500 "questionable" transactions (PJ¹ [537])), the tender by Aristocrat of a "mass of material" (PJ [34], [63]) and a lengthy hearing occupying more than four weeks, ultimately Aristocrat:

(a) failed to produce a single infringing article sold by Global/Impact (AJ [98]);

¹ These submissions adopt Aristocrat's summary form of reference to the judgments below, viz *Aristocrat Technologies Pty Ltd v Global Gaming Supplies Pty Ltd* (2009) 84 IPR 222, [2009] FCA 1495 – PJ; *Allam v Aristocrat Technologies Australia Pty Ltd*; *Global Gaming Supplies Pty Ltd v Aristocrat Technologies Pty Ltd* (2012) 95 IPR 242; [2012] FCAFC 34 – AJ; *Allam v Aristocrat Technologies Australia Pty Ltd (No. 2)* [2012] FCAFC 75 – SAJ.

- (b) failed to identify any infringing components of the gaming machines sold as part of the Impugned Transactions (PJ [822], [880]);
- (c) failed to produce any direct evidence of copyright infringement by Global/Impact (PJ [7], [35]; AJ [112]);
- (d) failed to make good its case that Global/Impact was involved in a large scale counterfeiting operation (PJ [5], [909]); and
- (e) constructed its case largely upon a ‘data matching’ exercise which was shown to be riddled with errors and fundamentally flawed (PJ [561], [572]-[574], [580], [581], [823]; AJ [80]).

10 11. Instead, Aristocrat sought to construct its case against Global/Impact, of infringement under s. 38 of the Act, from entirely circumstantial evidence. Accordingly, the evidence was required to be such as to give rise to a “*reasonable and definite inference*”² of infringement, which inference could not be provided by inexact proofs or indirect inferences, having regard particularly to the seriousness of the allegations made against Global/Impact.³ Considered in light of the Full Court’s conclusions, the evidence did not reach those required standards.

12. These submissions address *seriatim* the issues set out in Part II above.

B. Matter not argued below

20 13. As a threshold matter, Aristocrat ought not be permitted to propound in this Court its substantive argument that the knowledge element required by s. 38 of the Act was satisfied without reliance upon the evidence which the Full Court held had been erroneously admitted (in particular the Emails). Neither at first instance nor during the hearing of the appeal to the Full Court did Aristocrat propound such a case.

14. To the contrary, Aristocrat’s case as to Global/Impact’s knowledge of Tonita’s production of the fake components, both before the primary judge and at the hearing of the appeal to the Full Court, was based positively and affirmatively upon the Emails (AJ [246], SAJ [37], [38], [43]); “*great weight*” was placed by Aristocrat upon the Emails (PJ [264]), which constituted “*the very basis of Aristocrat’s case*” (SAJ [43]). Aristocrat

² *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at [34].

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361, 362; *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at [170].

has accepted that it made no attempt before the primary judge or at the hearing of the appeal to establish the requisite knowledge of Global/Impact without reference to the Emails, and appears to have accepted that without reliance on the Emails its case “*must fail*” (AJ [246], SAJ [43], [44], [48]).

15. It was only after the Full Court delivered judgment upholding the appeals of Global/Impact and the Tonita parties that Aristocrat asked the Full Court to reassess the evidence in order to demonstrate s. 38 infringement by Global/Impact without reliance upon the Emails (SAJ [41], [42]). Aristocrat was seeking to re-open its case on appeal (SAJ [44]), *after judgment*.

10 16. Aristocrat’s belated attempt to reopen was rejected by the Full Court (SAJ [44], [45], [47], [48]), because (a) the alternative basis for a finding of relevant knowledge which Aristocrat was seeking to agitate had not been argued at trial or on the appeal; (b) Aristocrat had had ample opportunity during the course of the lengthy appeal to raise its alternative argument (SAJ [40]); (c) it was inappropriate for the Full Court to make findings not made by the primary judge in a case involving such a “*mass of material*” (PJ [34], SAJ [42]); and (d) in particular because (as Aristocrat accepted) the Court had not received argument during the course of the appeal as to how it should itself weigh the evidence in the absence of the Emails (SAJ [43], [47]). In the result, the Court declined to permit the argument to be reopened and also declined Aristocrat’s application to have the matter referred back to the primary judge for the making of any necessary further findings (SAJ [41]-[45], [47], [48]).

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17. Critically, no appeal has been brought by Aristocrat to this Court against the discretionary decision of the Full Court not to permit Aristocrat to reopen its case following delivery of the Full Court’s judgment (which had been reserved for more than a year); and that decision has not been shown to be attended by relevant error.

18. It is not in the interests of the administration of justice, especially in the absence of exceptional circumstances, that Aristocrat be permitted to agitate in this Court arguments which it declined to undertake at first instance and on appeal, until after the result (adverse to Aristocrat) had become known. The principles of finality of litigation should be applied.

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C. Concurrent findings

19. Aristocrat's Submissions (e.g. at [57]-[61], [63]) found substantially upon what are said to be concurrent findings made with respect to the Impugned Transactions.

20. However, the subject findings were not concurrent. The findings of the Full Court as to the Impugned Transactions were conditional and were made upon the express assumption that the primary judge had *correctly* used the Emails in the way he did in finding knowledge on the part of Global/Impact (AJ [248]). That is, the findings were expressly made upon the counterfactual, hypothetical assumption that Global/Impact had knowledge of Tonita's relevant counterfeiting activities (this reasoning seems to have applied as much to the seized materials the subject of the s. 136 Rulings as to the Emails (AJ [174], [175])). The Full Court, however, concluded that the primary judge was *not* correct in adopting that approach (the Full Court concluded that the third, fourth and fifth "essential propositions" (PJ [720]-[722]) were not available to the primary judge, with the result that Aristocrat had failed to prove relevant infringement (AJ [246], [247])).

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21. A description of the findings as to the Impugned Transactions as "concurrent" is therefore misleading, in that the conclusions of the Full Court were entirely conditional upon the assumed incorrectness of the Full Court's own reasoning and conclusions which exposed the error in the primary judge's approach.

22. The conditional nature of the Full Court's findings as to the Impugned Transactions is important. Aristocrat cannot rely on "concurrent findings" of the Full Court as a basis for asserting error in the Full Court's reasoning, because it is only upon establishing error in the Full Court's reasoning that the findings will have become "concurrent".

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D. Section 136 Rulings

23. Fundamental to the findings of infringement against Global/Impact made by the primary judge were his earlier findings (embodied in the primary judge's first and second "essential propositions") that Tonita had manufactured fake components for inclusion in the machines sold by Global/Impact (AJ [121]).

24. Those findings were, in turn, based substantially upon the physical materials found at Tonita's Bankstown and Georges Hall premises (PJ [724], [725], [727], [735], [737]-[739]; AJ [90], [124], [125]).

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25. Importantly, those items were initially admitted under s. 136 only against Tonita and not against Global/Impact (PJ [377]; AJ [48]).
26. The Full Court held that the primary judge's eventual reversal of his initial s. 136 Rulings was erroneous (AJ [174], [175], [230]-[238]) and the Full Court's conclusions with respect to the s. 136 Rulings *are not the subject of challenge by Aristocrat in this Court*. In consequence, the evidence of Tonita's counterfeiting of components which the primary judge inferred were contained in the machines sold as part of the Impugned Transactions was and is not admissible against Global/Impact.
27. Not only, therefore, could there be no finding that Global/Impact had relevant knowledge of Tonita's counterfeiting, the whole foundation of the case as against Global/Impact (namely, that the machines sold by Global/Impact contained fake components manufactured by Tonita), has been irretrievably lost to Aristocrat.
28. Aristocrat's contention that the s. 136 Rulings were "*not material to the Full Court's ultimate decision*" (Aristocrat's Submissions [55]) is fundamentally incorrect. The s. 136 Rulings (which made the evidence against Tonita inadmissible against Global/Impact) fatally impugn the findings of counterfeiting by Tonita and the consequent factual and credit findings affecting Global/Impact, which form the foundation for Aristocrat's submissions in this Court.

E. The Emails

29. Aristocrat submits that the knowledge requirement of s. 38 of the Act was "*inexorably satisfied*" (Aristocrat's Submissions [66]) even without reliance upon the Emails. The submission founds substantially upon duplication of machine serial numbers in Global/Impact's invoices (Aristocrat's Submissions [18], [69]). Assuming that Aristocrat is permitted to argue the point in this Court (contrary to the matters raised at paras 13-18 above), its submission fails:-
- 29.1 Even if Global/Impact may be taken to have knowledge of the contents of their own records, that is not to say that they can be taken to know that machines they sold contained counterfeit, infringing parts.
- 29.2 The Global/Impact records were vast, covering thousands of transactions over many years (PJ [537], [560]), AJ [348]). Given that there was a system of issuing invoices *pro forma* which were later reissued (PJ [178]), that machines were

sometimes returned (AJ [319]), and that occasional errors were made by staff (all in the ordinary course of business), mere similarity or identity of a serial number in two invoices months apart could not have invested Global/Impact with knowledge (actual or constructive) of the inclusion of fake components. Manifestly, this must have been so in the absence of the kind of extensive, computer-driven data-matching exercise undertaken by Aristocrat for the purpose of these proceedings (which was itself found to be bedevilled with error (PJ [543], [572]-[577])).

10 29.3 To the extent that Aristocrat seeks to support its reliance on the invoices by reference to the adverse credit findings made against Messrs Andrews and Cragen (Aristocrat's Submissions [58]), and upon the findings as to the Impugned Transactions (Aristocrat's Submissions [57], [72]), the argument is circular. The findings as to credit and the Impugned Transactions were all made upon the basis of the evidence the subject of the s. 136 Rulings (and for that matter the Emails), which evidence was not available to Aristocrat for the reasons explained above.

20 29.4 As to the "Machines at Clubs" category, it is not at all apparent how Global/Impact knew or ought to have known that a serial number on a machine sold at any one point in time had a matching counterpart on a machine in a particular club somewhere in New South Wales (a matter established by Aristocrat only after an exhaustive process of physical examination of serial numbers attached to machines inspected on visits made by its investigators in clubs at various locations (AJ [843])).

30. Aristocrat's alternative submission that the Emails were available to establish the required element of knowledge is also incorrect:-

30.1 Whether or not the Emails were tendered as evidence of tendency (Aristocrat's Submissions [76]), the Emails did not relate to any of the Impugned Transactions; Aristocrat was thus necessarily required to establish a relevant connection with them (AJ [177], [240]-[241]).

30 30.2 The only means of making such connection was to establish a *tendency* on the part of Global/Impact to undertake dealings of the kind found in the Impugned Transactions (AJ [241]). Indeed, Aristocrat itself submitted to the Full Court that the Emails showed Global/Impact's "*preparedness and tendency to do exactly*

what we say they did in relation to machine numbers”.⁴ As the Full Court correctly held, that was impermissible given Aristocrat’s failure to comply with the requirements of s. 97 of the *Evidence Act*.

30.3 *Raben Footwear Pty Ltd v Polygram Records Inc* (1997) 75 FCR 88 provides no answer (Aristocrat’s Submissions [83]). In contrast to this case, the evidence of knowledge in *Raben* was supplied by communications which concerned the very transactions which involved copyright infringement. There was no evidence in these proceedings of the type which resulted in the finding of constructive knowledge made in *Raben* (PJ [249]).

10 30.4 Because the subject communications in *Raben* directly concerned the infringing transactions, there was unsurprisingly no consideration of the “tendency rule” and the case does stand as authority as to the application of the tendency rule.

31. Finally, the exceptions to the operation of s. 97 do not avail Aristocrat:-

31.1 Aristocrat did not address the tendency rule, and in particular its exceptions, at any time during the lengthy appeal hearing, despite the issue being amply ventilated (SAJ [31]).

31.2 Further, no appeal is brought to this Court from the Full Court’s decision as to the exceptions to s. 97, which were only raised by Aristocrat when it applied to reopen (SAJ [31]-[36]).

20 31.3 The exceptions have no application in any event:-

(a) as to s. 94(1) (Aristocrat’s Submissions [81]), Aristocrat did not tender the Emails “only” as to credit (even now they rely upon them for s. 38 purposes);

(b) as to s. 94(3) (Aristocrat’s Submissions [83]), the argument is circular as tendency was not a “fact in issue” (pleaded or otherwise) to which the Emails could or did go until Aristocrat came to tender the Emails, *thereby* potentially creating that very tendency issue;

(c) as to s. 97(2)(b) (Aristocrat’s Submissions [82]), Global/Impact had not themselves adduced tendency evidence – denials of infringement (recited in

⁴ Full Court transcript 10.8.10, page 121 line 7.

the passages of the primary judgment extracted by Aristocrat) do not constitute a “*positive case*”, let alone “*tendency evidence adduced by another party*” for the purposes of the sub-section.

Part VII: Argument on the respondents’ proposed notice of contention

32. For the reasons identified in their proposed Notice of Contention filed on 21 December 2012, Global/Impact submit that the Full Court erred in finding that the Impugned Transactions were proved. This requires, unfortunately, attention to a considerable body of factual material.
- 10 33. The findings of the Full Court (at AJ [249]-[362], [391]-[432] (“the **Alternative Findings**”) were made upon the express assumption discussed at paragraph 20 above.
34. It might be thought unclear whether that assumption (at AJ [248]) was intended to bring to account the conclusions of the Full Court as to the reversal by the primary judge of his initial s. 136 Rulings (for example, as to the physical items seized from the premises of Tonita).
35. If so, the assumption is not now sustainable, as no appeal has been brought by Aristocrat from the Full Court’s conclusions as to the s. 136 Rulings. Consequently, the findings of the primary judge and the Alternative Findings have no effect or utility.
- 20 36. If, on the other hand, the assumption was confined only to the use made by the primary judge of the Emails (and did not extend to the s. 136 Rulings as they related to the items obtained from Tonita’s premises), the Alternative Findings suffered from their Honours’ failure to bring to account the insurmountable problem that findings as to the Impugned Transactions could not be made in the absence of a wholesale reassessment of the evidence, limited to that which was admissible against Global/Impact. Nor would such findings be available upon such reassessment; without key evidence such as the seized items the entire case against Global/Impact is irretrievably undermined.
37. Moreover, in concluding that Global/Impact had knowledge of Tonita’s counterfeiting activities in respect of the Impugned Transactions, the Full Court erred in the following important respects:

37.1 The Full Court overlooked the evidence of Mr Channa that Tonita had in its possession reconditioned machines and parts for customers other than Global,⁵ and that Mr Allam did not want Global/Impact to know of Tonita's activities.⁶ This was vital evidence, as it left open, but unaddressed, the very real possibility that the items found at Tonita's premises held to be counterfeit⁷ had nothing whatever to do with Global/Impact, but were associated with Tonita's activities for other customers. There was not, on the evidence, any rational basis for excluding such a possibility, or for assigning to it any greater or lesser degree of probability than the competing inference that Tonita's infringing activities were carried out for the benefit of Global/Impact. In the face of these conflicting inferences of equal degrees of probability, the choice between them becomes a matter of conjecture, and the allegation is not proved.⁸

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37.2 Their Honours also overlooked the fact that it was never squarely put to Global/Impact's witnesses that they were aware that Tonita was manufacturing counterfeit Aristocrat compliance plates for export, or that he was illegally copying Aristocrat game software.

37.3 The Full Court failed to bring to account the absence of any evidence that Global/Impact had received payment on more than one occasion for the sale of so-called duplicate machines (notwithstanding that Aristocrat possessed all of Global/Impact's accounting records).

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37.4 The Full Court reached its conclusions in the absence of any evidence that Global/Impact had themselves copied any Aristocrat compliance plates or software (instead Tonita was held to have done these things (PJ [717]-[718])).

37.5 It was not possible on the evidence to conclude that any particular machine contained any particular counterfeit component (PJ [98], AJ [95]).

⁵ T 572/45-573/19; 574/8.

⁶ T 507/34-37; 573/17-19.

⁷ Namely, the 'Loose HDD', 'CCC-14' and counterfeit EPROMs and compliance plates the subject of the primary judge's findings at PJ [724]-[750].

⁸ *Bradshaw v McEwans Pty Limited* (1951) 217 ALR 1 at 5; *Luxton v Vines* (1952) 85 CLR 352 at 358, 360; *Jones v Dunkel* (1959) 101 CLR 298 at 305; *G v H* (1994) 181 CLR 387 at 390; *Carr v Baker* (1936) 36 SR (NSW) 301 at 306-307; see also *The Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at [34].

37.6 In nevertheless finding (PJ [869], AJ [305], [340]) that Global/Impact had caused compliance plate numbers to be forged, for the reason that this would assist machines to pass inspection, their Honours overlooked:

- (a) the absence of evidence that machines would in fact be more likely to pass inspection with fake compliance plates;
- (b) the evidence⁹ that Global/Impact possessed bins full of *genuine* Aristocrat compliance plates (obtained in the course of its business of refurbishing machines) and thus there was no need or reason to produce counterfeit plates.

37.7 It could not be inferred, as it was (PJ [987], AJ [131]), that there would be no point in using fake serial numbers on gaming machines if the game software installed in those machines was genuine (and, *ergo*, that the sold machines featured game software that infringed Aristocrat's copyright), when:

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- (a) it could not safely be inferred that the machines had fake serial numbers, for the reasons set out in 37.6 above;
- (b) it was pure speculation to conclude that the presence of fake serial numbers necessarily, or even probably, indicated the presence also of counterfeit (and infringing) software on each and every one of the machines in the Impugned Transactions; there was no basis in the evidence, or in principle, for so concluding;

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- (c) in the case of Peru (which was the destination country in many of the Impugned Transactions), such a finding was inconsistent with the finding of the primary judge (PJ [224], AJ [36], [37]) that the local regulations in that country required games and artwork on gaming machines to be in Spanish, not English. That being the case, it is difficult to see how counterfeit copies of Aristocrat game software (which, in order to be infringing, must have been in the English language) would have assisted machines to pass inspection in Peru;

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- (d) it was also inconsistent with the Full Court's conclusion (AJ [369]) that Spanish is the preferred language for gaming machine products in most Latin American countries, and that Aristocrat itself ordinarily translates the

⁹ Exhibit G (photographs taken by Mr Channa).

games and artwork used in its gaming machines from English into Spanish in order to sell into those markets.

38. The Full Court ought to have held that the primary judge's findings that Global/Impact had infringed Aristocrat's copyright in game software in each of the Impugned Transactions were attended by error and should have been set aside.

Infringement by dealing not established – 'duplicate number' (DN) machines

- 10 39. The Full Court upheld (AJ [307]) the findings of the primary judge that Global/Impact had infringed Aristocrat's copyright by selling machines within 5 transactions (relevantly transactions 13, 20, 28, 46 and 51) in the so-called 'Duplicate Numbers' ("DN") category.
40. The DN category was a short-hand reference to transactions in which Global/Impact were alleged to have sold machines bearing the same serial number on more than one occasion (AJ [266]).

No pleaded allegation of infringement – transactions 13, 20 and 46

41. With respect to transactions 13, 20 and 46, the Full Court erroneously rejected (AJ [254]) Global/Impact's submission that the subject transactions had never been pleaded or particularised against Global/Impact:-
- 20 41.1 The allegedly infringing transactions to which Global/Impact were required to respond were identified by Aristocrat in Amended Particulars, comprising 100 pages which included extensive spreadsheets (identified as Annexures A and B) detailing a large number of transactions (AJ[250]) ("the **Particulars**").
- 41.2 As found by the primary judge (PJ [540]), Aristocrat explained in its opening submissions and in the Particulars (para 67A) that the transactions alleged to involve infringement of copyright were colour-coded in the tables red, orange and yellow. A large number of transactions in the tables (including transactions 13, 20 and 46) were not colour-coded at all (AJ [252]).
- 41.3 Aristocrat in its written outline of opening submissions acknowledged¹⁰ that it was only the red, orange and yellow entries in the tables which raised "very real

¹⁰ Applicant's Outline of Opening Submissions dated 22.9.08, para 51.

inferences” of counterfeiting, and only those entries in respect of which Global/Impact bore an evidentiary onus to rebut the allegations of infringement.

41.4 The Full Court nevertheless concluded (AJ [254]) that *all* of the transactions identified in the tables to the Particulars were alleged by Aristocrat to involve infringements of copyright, whether they were colour-coded or not; its exposed reasoning (that the tables had an uncoded heading "participants in infringements" identifying transaction participants (AJ [254])) does not overcome the clearly-stated position identified at 41.2 and 41.3 above.

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41.5 The basis on which the Full Court sought to diminish the significance of Aristocrat’s opening approach (that is, that the references to colour-coding were to exhibits to an affidavit of Ms Gardner, not the Particulars (AJ [256]-[258])) is of no moment, as the differences were *de minimis*.

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41.6 The fact that Mr Andrews, having noted that these transactions were not part of the case against Global/Impact, nevertheless provided a response to them in summary form did not have the effect ascribed to it by the Full Court (AJ [259], [260], [300]). The explanations proffered by Mr Andrews were his best attempt in the circumstances to reconstruct events within a vast ‘jigsaw puzzle’ (AJ [348]) of records of the Global/Impact businesses which had been seized and tendered *en masse* by Aristocrat. This did not have the effect of expanding the pleaded and particularised case; any evidentiary onus to which Global/Impact was subject could not extend beyond those transactions (namely the colour-coded ones) to which Aristocrat in its opening submissions contended an evidentiary onus applied.

42. As the Full Court elsewhere concluded (AJ [417], [418]), Aristocrat ought be held to its pleaded case and Global/Impact “*were entitled to rely on the Particulars in advancing their respective defences and in making their forensic decisions...*”. Consistently with this approach, the findings of infringement in respect of transactions 13, 20 and 46 were not available to the Full Court and should be set aside.

Alleged infringing acts pre-dated the joint venture – transactions 13, 20 and 28

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43. The Full Court concluded (AJ [302]) with respect to transactions 13, 20 and 28 that, although the transactions occurred prior to the formation of the joint venture between

Global and Impact (on 1 October 2004 (PJ [765]; AJ [25]), nevertheless infringement could be maintained against the Global parties only.

44. Implicit in this conclusion is a finding that Global, prior to the formation of the joint venture on 1 October 2004, had the requisite knowledge for the purposes of s. 38 of the Act that Mr Allam was producing fake components and thereby infringing Aristocrat's copyright.
45. However, that cannot have been the case with respect to transaction 13, which took place on 17 July 2002 (AJ [270]), as Mr Allam's association with Global did not commence until about January 2003 (PJ [96]). Self-evidently, the Global parties cannot have known about counterfeiting by Mr Allam prior to that date, and no findings of infringement can be made against the Global parties in respect of transaction 13.
46. Transactions 20 and 28 occurred in 2003 (AJ [274], [277(a)]). Although post-dating the commencement of Mr Allam's association with Global, the primary judge's findings were limited to work that Mr Allam performed for Global/Impact as and from January 2004 (PJ [96], [149], [150]).
47. Accordingly, it was not permissible to conclude in respect of transactions 20 and 28 that the Global parties had the requisite degree of knowledge of Mr Allam's activities so as to render them liable for copyright infringement under s. 38 of the Act. No findings of infringement in respect of those transactions should therefore have been made.
48. In support of this conclusion was the evidence of Mr Andrews, accepted by the primary judge in the context of the 'Play King' and other transactions (PJ [217], [218], [253], [589], [857]), that it had been Global's practice prior to the formation of the joint venture in 2004 to ship machines from independent suppliers directly to the customer, such that Global never came into physical possession of the machines (and thus did not authorise or sanction Mr Allam to carry out counterfeiting activities on those machines). This important evidence, not challenged by Aristocrat (PJ [218], [253] with respect to the Play King transaction), was disregarded by the Full Court (AJ [304]). The Full Court's observation that the primary judge had implicitly concluded that the practice did not apply in the case of transactions 13, 20 and 28 was not correct; having found that the practice existed the primary judge did not apply it to transactions 13, 20 and 28 in terms, but there was no rational basis for the Full Court's conclusion that the primary judge had therefore found that the practice had not also been applied in these transactions.

49. The Full Court's conclusion that these Impugned Transactions infringed Aristocrat's copyright accordingly miscarried.

DN transactions generally

50. Quite apart from the matters relating to duplicated serial numbers earlier discussed, there was an overarching problem arising from the manner in which the Impugned Transactions in the DN category were pleaded and particularised. Whilst many transactions were identified, none (even where colour-coded) was identified as a transaction which Aristocrat alleged could be shown to have infringed *by reason of the repetition of serial numbers in the invoices*.
- 10 51. Remarkably, however, after the close of evidence and in the course of final submissions, Aristocrat sought to introduce for the first time, without seeking to amend, an allegation that infringement was demonstrated by the presence of duplicated numbers in the invoices of Global/Impact.
52. The Full Court held that the primary judge had not erred in dismissing Global/Impact's objections to these late-raised allegations, principally on the ground that Global/Impact had chosen to lead evidence in respect of the transactions (AJ [299], [300]).
53. However, the Full Court erroneously failed to take into account the relevant facts that, as the primary judge had recorded (PJ [931]), Global/Impact were confronted with a 'snowstorm of paper' unleashed by Aristocrat, spanning innumerable transactions over a
20 lengthy period; that the Global/Impact directors had been called upon to reconstruct, and provide explanations for, individual transactions years after they had occurred and from a context of a vast 'jigsaw puzzle' of documents (AJ [348]); and that Aristocrat's allegations of infringement based upon duplication in invoices had not been identified at the time that Global/Impact's explanations were proffered to the Court.
54. The late, unpleaded allegations of infringement based on duplicate numbers, made after closure of the evidence, was impermissible. A party is not entitled to plant "a forest of forensic contingencies" and to wait until final address to map a path through it.¹¹ Yet, that is what happened here.

¹¹ *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 291 ALR 399 at [27].

55. The course adopted was productive of material prejudice to Global/Impact. Had the duplicate number issue been identified in a timely fashion, Global/Impact would have been in a position to take steps to counter it *before* the hearing commenced. Such steps might have included, for example:-

(a) corroborative evidence from overseas customers that one of the two asserted duplicate transactions had not in fact been consummated or that it had received a *pro forma* invoice followed by a final invoice;

(b) evidence from accounting records of the making of only one payment where two sales had been alleged;

10 (c) evidence that invoice entries had been made in error.

56. In concluding, on the evidence of invoice duplications, that machines in the DN category infringed, the Full Court fell into error and its findings ought be set aside.

Infringement not established – machines in clubs (MC) category

57. The Full Court upheld (AJ [318]-[362]) the conclusions of the primary judge that Global/Impact had infringed Aristocrat’s copyright in game software by selling machines within 4 transactions (transactions 34, 36, 48 and 54) in the so-called ‘Machines at Clubs’ (“MC”) category.

20 58. The MC category described transactions involving gaming machines which, although recorded in invoices for machines supplied by Global/Impact to overseas customers, had serial numbers identical to those attached to machines located in clubs in New South Wales (AJ [308]).

Transactions 34, 36 and 48

59. In upholding the primary judge’s conclusions of infringement with respect to transactions 34, 36 and 48, the Full Court erred in determining for itself whether Mr Andrews’ evidence (that relevant serial number repetitions resulted from clerical error) ought be accepted or rejected (AJ [341]-[364]).

60. In the absence of relevant findings by the primary judge (AJ [339]-[340]), it was not open to the Full Court to itself embark upon such a fact-finding process, dependent as it was substantially upon matters of credit (particularly without first excising from

consideration the evidence which the Full Court had earlier held was not admissible against Global/Impact). The limitations upon the capacity of appellate courts to make findings as to primary facts is well recognised.¹²

61. Further, in respect of transaction 36, the Full Court incorrectly concluded that the primary judge had not erred by failing to bring to account relevant evidence given by Aristocrat's Mr Coster¹³ that upon inspection of machines at the premises of this customer (Cathay Entretenimientos) in Peru no counterfeit machines or components supplied by Global/Impact could be found. The principal reason advanced by the Full Court, that the evidence did not rise so high as to suggest that *every* machine supplied by Global/Impact to Cathay Entretenimientos had been located and inspected (AJ [338]), was not a proper basis for its conclusion – Mr Coster's failure to identify *any* infringing articles at the premises of this customer was a telling fact that ought to have been weighed as a matter tending against findings of infringement. The Full Court should so have found.
- 10
62. With respect to transaction 48, the Full Court concluded (AJ [360]), in the absence of a proper basis for so doing, that it would not accept evidence adduced by Global/Impact that three of the subject machines had been obtained from Global/Impact's supplier IGT, in circumstances in which it was at least open to conclude that any production of fake components in the machines had been undertaken by that supplier. In doing so, the Full Court again embarked upon the fact-finding process impermissibly and its conclusions are therefore unsound.
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Section 115(4) damages

63. As no basis existed for any findings of infringement against Global/Impact, and as the findings made by the primary judge are undermined by reliance on evidence that was inadmissible as a result of s. 136 Rulings and tendency-related rulings, no basis existed for any award of s.115(4) damages against Global/Impact.

¹² *Fox v Percy* (2003) 214 CLR 118 at 993-994 [23]; *Suival v Cessnock City Council*; (2003) 200 ALR 1 at [75].

¹³ Affidavit of G Coster 9.1.08, [26]-[28], [34]; T 476/30-40, 725/23.

Part VIII: Oral argument

64. Global/Impact estimate that approximately 20 minutes will be required for presentation of their oral argument on the application for special leave, and if a grant of special leave is made in excess of four hours will be required for presentation of their oral argument on the substantive appeal (including their proposed Notice of Contention).

DATED: 1 February 2013



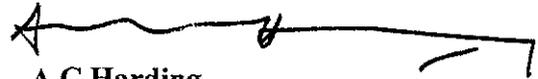
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