

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S169/2012

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

BETWEEN:

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

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ARISTOCRAT INTERNATIONAL PTY LIMITED
(ACN 000 148 158)
Second Applicant

ARISTOCRAT TECHNOLOGIES INC
Third Applicant

and

RIAD ALLAM
First Respondent

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

ANTHONY EDWARD ANDREWS
Third Respondent

IMPACT GAMING PTY LIMITED
(ACN 109 299 461)
Fourth Respondent

FRANCIS GEORGE BERNARD CRAGEN
Fifth Respondent

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TONITA ENTERPRISE PTY LIMIED
(ACN 120 737 402)
Sixth Respondent



FIRST and SIXTH RESPONDENTS' SUBMISSIONS

Part I: Suitable for publication

1. The First and Sixth respondents certify that this submission is in a form suitable for publication on the internet.

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

2. Whether the interests of justice ought permit a party to argue the same matter in this Court where:
 - 2.1 it had been refused leave by an intermediate appellate court to reopen an appeal to argue a matter not previously argued at trial or on the appeal; and
 - 2.2 it does not seek to challenge or otherwise demonstrate any error in the exercise of the intermediate appellate court's discretion.
3. Whether the findings of fact essential to the applicants'/appellants' (collectively "Aristocrat's") application are correctly characterised as "concurrent" to a finding of infringement by dealing at least insofar as Mr Allam is concerned.
4. Whether correctly construed, section 38 of the *Copyright Act 1968* (Cth) ("the **Copyright Act**") should comprehend liability of a party as a joint tortfeasor where that party did not itself engage in any of the activity to which paragraphs 38(1)(a) or (b) of the Act might apply.
5. Whether Aristocrat's claims against Mr Allam can succeed in the absence of evidence excluded as a result of the rulings made by the primary judge pursuant to section 136 of the *Evidence Act 1995* (Cth) (the **section 136 Rulings**), which evidence the Full Court held should not have been admitted.
6. Whether any part of six email chains tendered by Aristocrat (the **Emails**) were admissible to establish Mr Allam's joint tortfeasorship for the purpose of section 38 of the Copyright Act in relation to the two transactions now maintained against him. If not, whether the evidence disclosed any other satisfactory basis for inferring relevant knowledge in relation to those two transactions.
7. Whether the Full Court, in making findings with respect to those two transactions, erred in the respects set out in the Second to Fifth Respondents' ("**Global/Impact's**") proposed Notice of Contention which Mr Allam supports in relation to transactions 48 and 51 (being the only two transactions now maintained against him).

8. Whether the Full Court, in making findings concerning Mr Allam's infringements pursuant to section 36 of the Copyright Act erred in treating them as capable of supporting activity in relation to section 38 of the Copyright Act. This is comprehended by the First and Sixth Respondents proposed Notice of Contention.

Part III: Judiciary Act 1903

9. The respondents certify that they consider it unnecessary to give notice pursuant to the requirements of section 78B of the *Judiciary Act 1903*.

Part IV: Contested facts

10. The respondents generally accept Aristocrat's summary of the relevant facts, save for the following matters.
11. Paragraph 15 of the Applicant's Submissions (**Aristocrat's Submissions**), overlooks the finding that the Tonita Parties were not parties to the joint venture (AJ [26]). It was never alleged that Mr Allam or Tonita was involved in a "joint venture". Neither Mr Allam nor Tonita (after it was incorporated on 14 July 2006 AJ [28])) was alleged to have been directly responsible for the secondary infringements for the purposes of section 38 of the *Copyright Act 1968* (Cth): PJ [55]. Allegations of infringement by secondary dealing had been pleaded and particularised against the Global/Impact Parties *prior to* Mr Allam's first provision of refurbishment services to those parties (prior to 1 October 2004).
12. The dispute as to the "nature of the joint venture and its date of commencement" (Aristocrat's Submissions, para. 15) was as between the Global and Impact parties, not in relation to the Tonita Parties.
13. The finding made by the primary judge in relation to Mr Allam's liability for damages (as set out in Aristocrat's Submissions at paragraph 25) overlooks what the Full Court came to hold in relation to the fact that Aristocrat supplied detailed particulars in relation to the impugned transactions identifying what it alleged to be the participation of one or more of respondents, with the effect that, if it was necessary to do so, the Full Court would have allocated additional damages "on a proportional basis by transaction": AJ [416]-[419]. Similarly, the findings in relation to Mr Allam (set out in paragraph 42 of Aristocrat's Submissions) overlooks the manner in which the Full Court came to refine the position when coming to determine the orders to be made: (SAJ [20]-[21]). No specific finding had been made by the primary judge apart from a game called "Golden Pyramids." (AJ

[21]). The transactions identified as 48 and 51 do not identify the games involved: SAJ [23]. The question as to whether any further orders are to be made against Mr Allam for primary infringement have been remitted to the primary judge. At this point, the answer to the remittal remains hypothetical.

14. Further, the joint venture did not depend upon the provision of gaming machines with software. There was no finding to this effect by the primary judge. The Full Court rejected an order sought by Aristocrat that the question of authorisation by the Global/Impact Parties be referred to the Primary Judge: SAJ [46]-[48]. The draft notice of appeal does not challenge that determination.
- 10 15. Mr Allam's provision of technical know-how was not essential to an infringing sale. This, at least followed from the findings of liability (for secondary infringements) made by the primary judge in relation to the period in which Mr Allam had no involvement at all (prior to 1 October 2004): PJ [96], PJ [902]-[903].
16. The matters in paragraph 48 of Aristocrat's Submissions overlook the careful consideration by the Full Court after an appeal lasting 8 days, that the primary judge erred, as a matter of procedural fairness, in admitting the evidence during closing submissions, because the respondents at first instance may have adopted a different course if the emails had been tendered prior to the close of evidence: AJ [234], [236], [238]. All the respondents pressed their reliance on the 'usual' s.136 rulings (AJ
20 [212(d)(i)]).
17. The six email chains admitted into evidence by the primary judge did not relate to any of the transactions the subject of the alleged infringements (AJ [177], [240]). The issue concerning tendency evidence and the operation of section 97 necessarily emerged from the use which the primary judge had come to make of those emails in coming to terms with Aristocrat's case based upon circumstantial and indirect evidence (AJ [240]; PJ [36]).
18. While it is correct that Aristocrat gaming machines come in different versions and each is supplied with game software (and other art work) for a particular Aristocrat game (Aristocrat's Submissions, paragraph 9), the case which the Aristocrat parties conducted
30 before the primary judge was not so general:
 - 18.1 The software the subject of the primary and secondary infringement proceedings was limited to an initial list of 83 Aristocrat games alleged in the table at

paragraph 1 of the Applicants' Consolidated Statement of Particulars, which was then further narrowed to 51 Aristocrat games listed in Aristocrat's closing submissions (pages 86 to 88).

18.2 The Aristocrat parties closed their case alleging that infringing game software existed only in machines the subject of six transactions (15, 16, 19, 42, 49 and 50).

18.3 That is, it was *not* part of Aristocrat's case that all of the infringing transactions involved infringing game software. For present purposes, no infringing software was alleged to exist in machines the subject of transactions 48 or 51. There was no finding open to the primary judge concerning the infringing content of these two transactions, which the Full Court correctly accepted: SAJ [23].

18.4 The invoices appearing in Mr Andrews' extensive documentary evidence identified no games on invoices in relation to either transaction 48 or 51.

18.5 There was no evidence before the primary judge which connected Mr Allam in any way with transactions 48 and 51. Mr Allam was not cross examined concerning those transactions.

18.6 The Aristocrat parties did not allege nor submit that the two found instances of compliance plate infringement were connected to transactions 48 or 51 (or, for that matter, to any other transaction).

18.7 Thus it was not even possible to determine what, if any, copyright subject matter was involved. It follows that there was no evidence to suggest the nature of any article which might engage the provisions of section 38 of the Copyright Act.

19. Contrary to paragraph 16 of Aristocrat's submissions, the subject matter of the "12 to 15 November 2004 email chain" were the 1300 genuine Aristocrat "upright" Mark V gaming machines and the 1000 genuine Aristocrat "slant top" Mark V gaming machines which Aristocrat had supplied to Neuvostar SA. Those machines had with them genuine Aristocrat blank compliance plates. PJ [152]-[157] and [279]-[281].

20. Mr Allam's so called "positive case" was limited to responding to the transactions and matters alleged against him. Of the nine so-called Impugned Transactions, only two were actually alleged against Mr Allam. It was unnecessary for him to respond to the others in relation to an infringement based upon section 38 of the Act. Mr Allam opened his

defence of the proceedings (which the primary judge acknowledged (transcript T1391.21-30) and closed his case (Closing Apps para 8 and 9) on the basis of the pleaded and particularised allegations, and that otherwise there was no positive onus upon Mr Allam to make positive contentions of fact (Closing Apps para 18):

20.1 ‘**Transaction 48**’ consisted of an allegation that five machines were infringing. There was no material brought forward against Mr Allam in respect of this transaction. Mr Andrews said that four of those machines were sourced from IGT and the other machine was not accounted for by Aristocrat due to a transcription error in the serial number of one digit.

10 20.2 ‘**Transaction 51**’ consisted of a shipment of machines to Mak’s International in Peru. Mr Greenslade (Aristocrat’s then chief legal officer) gave evidence that gaming machines in Peru were required by law to have Spanish games in them (T174-5). Mr Coster confirmed that position (T477.32).

21. In relation to transaction 51, Mr Andrews gave uncontradicted evidence that he sourced those machines from a competitor of Aristocrat, IGT, which had received them as trade-ins for IGT’s machines, and that Mr Andrews then on-sold them. That is, Mr Allam had no involvement. The primary judge outlined (and accepted) this method of operation by Mr Andrews when discussing transaction 1 (Play King) PJ [216]-[218].

20 22. Contrary to paragraph 40 of Aristocrat’s submissions, the Full Court did not confirm the “real issue” as whether the DN transactions and the MC transactions could be otherwise explained. The Full Court explained that the “real question” for the appeal was whether the five “essential” propositions articulated by the primary judge can be shown to have been made in error AJ[122].

30 23. Contrary to paragraph 49 of Aristocrat’s Submissions, the full court did not find that only two of the Impugned Transactions were properly particularised against Mr Allam. The full court found that the primary judge was not in error for entertaining a case of infringement based upon duplicate serial numbers when such case was not pleaded. As against Mr Allam, the only transaction (from all the duplicate serial number transactions) was which asserted against him was transaction 51. AJ [299]. The only transaction (from all the machines in clubs transactions) which was asserted against Mr Allam was transaction 51. No other transactions (from the Impugned Transactions) were asserted against Mr Allam at all.

24. As was common between the parties, and as the primary judge found, all 54 transactions were concluded before the sixth respondent, Tonita, was incorporated PJ [904]. While not explicit about it, the Aristocrat parties must now accept this to be the case: Aristocrat submissions, paragraph 50.

Part V: Applicable provisions

25. The respondents accept the statement of applicable provisions in Part VII of Aristocrat's Submissions, except that section 36 of the *Copyright Act* and section 136 of the *Evidence Act, 1995* (Cth) are also relevant.

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

10 A. Introduction

26. In the interests of brevity, the first and sixth respondents seek to rely upon the substance of submissions they made in their summary of argument appearing at AB 427 as affected by Aristocrat's narrowing of its application for special leave and grounds of appeal.

27. On 16 November 2012, two members of this Court referred the question of special leave to an enlarged bench¹ in relation to a prospective amendment to application for special leave and draft notice of appeal. Those amendments were filed on 5 December 2012. Their effect is to confine Aristocrat's extant claim against the first respondent ("Mr Allam") to two transactions² of the 54 transactions agitated at trial.³ These are the only transactions particularised against Mr Allam which the primary judge had held to be
20 infringing.

28. The Aristocrat parties brought forward a case that the present respondents were involved in a large scale counterfeiting operation to "re-birth" Aristocrat machines with counterfeit parts for sale in South America, and particularly for sale in Peru. Aristocrat had operations in over 200 countries, employed more than 2,000 staff, with revenue in each of the years 2004, 2005, and 2006 of well over \$1 billion dollars. At all times, Aristocrat had its own anti-piracy team (Greenslade affidavit para 16) which included Mr Coster.

29. Despite this global operational reach and availability of sophisticated investigative resources, in opening, senior counsel for Aristocrat confirmed to the primary judge

¹ [2012] HCATrans 296.

² MC transaction 48 and DN transaction 51.

³ Para 5 of each of the Amended Application for Special Leave and Amended Draft Appeal.

“...there is no single constructed infringing machine of that kind that we found.” (T35-46). The Aristocrat parties did not seize a single machine from South America despite knowing the exact location and venue of each sale recorded in all 54 transactions. (T36.36). No item from any of the respondents’ premises or computers (whether cabinets, artwork, eproms, compliance plate, images) was found to be in Spanish.

- 10 30. While its case for direct infringement pursuant to section 36 of the Copyright Act was differently framed, Aristocrat sought to make out its case before the primary judge in relation to infringement of section 38 of the Copyright Act, from entirely circumstantial evidence. Such evidence was required to be such as to give rise to a “*reasonable and definite inference*”⁴ of infringement. Having regard to the seriousness of the allegations made against Mr Allam and Tonita the inference could not be provided by inexact proofs or indirect inferences.⁵ That submission was made to the primary judge by the Tonita parties and recorded in his reasons (PJ [590]-[605].)
31. As is apparent from the Full Court’s conclusions reached after careful consideration and evaluation of the material before the primary judge, the evidence did not reach those required standards.
32. These submissions address the issues set out Part II above.
33. As concerns special leave and the concurrent hearing:
- 20 33.1 The question isolated by Aristocrat as meriting a grant of special leave requires a dissection of the Full Court’s conclusion reached after its careful evaluation of the evidence and transcript before the primary judge as to whether the primary judge’s discretion had miscarried. The question is unique to the complex factual circumstances of the case. These facts make the present case an inappropriate vehicle to consider the operation of a statutory rule of evidence.
- 33.2 The manner in which the case was conducted before the primary judge and before the Full Court is inconsistent with the case which Aristocrat now seeks to advance were special leave to be granted.

⁴ *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at [34].

⁵ Such is plain from *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361, 362. And section 140 of the *Evidence Act*.

B. Interests of justice

34. It was only after the Full Court delivered judgment upholding the appeals of Mr Allam and Global/Impact that Aristocrat asked the Full Court to reassess the evidence in order to demonstrate section 38 infringement *by* Global/Impact without reliance upon the Emails (SAJ [41], [42]) (Aristocrat was seeking to re-open its case on appeal to present this argument (SAJ [44])).
35. The present argument was only first raised by Aristocrat after the Full Court had published its reasons. The Full Court considered and rejected Aristocrat's attempt to formulate this alternative basis of liability in the circumstances and considered there to be no reason to remit it to the primary judge: SAJ [41], [43], [44], [48]
36. Aristocrat took a deliberate forensic position in relation to the conduct of the proceedings before the primary judge and the manner in which it chose to defend the proceedings on appeal. As the Full Court noted, Aristocrat had opportunity to seek to bring a case during the course of the appeal, which included a period of substantial adjournment: SAJ [40]. Aristocrat simply failed to point to findings of fact on which it relied other than by reference to the emails.
37. No appeal has been brought by Aristocrat to this Court against the Full Court's decision 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). In any event, that decision cannot be shown to be attended by any relevant error admitting such a challenge.
38. It is not in the interests of the administration of justice that Aristocrat be permitted to agitate in this Court an argument 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.
39. It follows that no basis has been disclosed for this Court's intervention.

C. Concurrent findings

40. It is notable that the centerpiece of Aristocrat's Submissions (at [57]-[61] and [63]) which deploy the concept of "concurrent [factual] findings" are directed towards the knowledge and activities of the Global/Impact parties and not that of Mr Allam.
41. Contrary to the observation in Aristocrat's Submissions at [69], there is nothing to connect Mr Allam to Global/Impact's invoices. Moreover, the argument developed by

Aristocrat fails to take into account that the Full Court was considering a circumstance which was not material to its principal holding that the primary judge erred in adopting the approach for which Aristocrat now contends: AJ [174]-[175]. The Full Court held that the third, fourth, and fifth so-called “essential propositions” (PJ [720]-[722]) were not available to the primary judge with the result that Aristocrat’s case of infringement by dealing failed: AJ [246]-[247].

42. Thus, any suggestion by Aristocrat that the findings are “concurrent” in any relevant sense is a mischaracterisation and overlooks the conditional nature of the Full Court’s discussion of the Impugned Transactions. It necessarily follows that the “findings” to which Aristocrat grasps to suggest error by the Full Court justifying this Court’s intervention are not available to it.

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D. Section 38 of the Copyright Act does not apply to Mr Allam in the present case

43. Even if this Court comes to consider the operation of section 97 of the *Evidence Act 1995* (Cth), a factual gap remains in Aristocrat’s substantive challenge proposed in the draft notice of appeal with the result that the appeal is bound to fail. This is because of the fundamental difference of position between Mr Allam and that of the remaining respondents (the second, third, fourth, and fifth respondents) (the **Global/Impact Parties**).

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44. Mr Allam was not a party to the joint venture (AJ⁶ [26]) and was not alleged to have been a primary party to the infringements for the purposes of section 38 of the *Copyright Act* 1968 (Cth). Unlike section 36 (and 101), the Copyright Act contains no cause of action for “authorisation” in relation to secondary infringements.

45. The findings of infringement against Mr Allam were in relation to direct infringement only (*Copyright Act*, s. 36) (AJ [90]). The primary judge made no orders in relation to primary infringements, a matter which was the subject of a cross-appeal to the Full Court and has been remitted to the primary judge for further consideration in relation to declaratory or injunctive relief (“if any”) (SAJ [27]).

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46. In the present case, any putative infringement by dealing is a separate contravention from the primary one and entails separate ‘tortious’ conduct. For that reason, there cannot be

⁶ Appeal Judgment (AJ): *Allam v Aristocrat Technologies Australia Pty Ltd* [2012] FCAFC 34; 95 IPR 242. Supplementary Appeal Judgment (SAJ): *Allam v Aristocrat Technologies Australia Pty Ltd* [2012] FCAFC 75. Primary Judgment (PJ): *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd* [2009] FCA 1495; 84 IPR 222.

any co-ordinate liability between those infringing, for example, by reproduction, and those infringing by sale.⁷

47. Aristocrat does not make clear in its submissions how it can be said that Mr Allam was a joint tortfeasor in relation to a dealing undertaken by the Global/Impact parties. He was not undertaking any of the activities to which section 38(1) might apply.
48. Mr Allam submits that there is no authority which requires or should compel this Court to accept that the concept of joint-tortfeasorship is available to a plaintiff to extend the ambit of section 38 of the Copyright Act to a person in the position of Mr Allam, particularly where the legislature has chosen to import a concept of “authorization” in relation to primary infringement, and where (as here) a party is not itself involved in the activities proscribed by paragraphs 38(1)(a) or (b) of the Copyright Act.
49. There is nothing from the observations of Gummow and Hayne JJ in *Roadshow Films Pty Ltd v iiNET Ltd* [2012] HCA 16; 286 ALR 466, at [145] (and footnote 164) which tells against this submission.
50. Further, there is nothing in the observations of Crennan J in *Northern Territory v Collins* [2008] HCA 49; 235 CLR 619, at [102]ff, or French J (as the Chief Justice then was) when determining the intermediate appeal in the same matter: *Collins v Northern Territory* [2007] FCAFC 152; 161 FCR 549, at [28]. The copyright owner must look to section 36 for a remedy, as it sought to do in the present case.
51. If this submission is accepted, it follows that Aristocrat’s present application must fail.

E. Section 136 Rulings

52. No grounds have been advanced as to why the Full Court erred in its conclusions as to the ‘section 136 Rulings’. Mr Allam submits that the careful consideration by the Full Court of the rulings and the Court’s rejection of the primary judge’s revision of them is absent error.

⁷ *The Koursk* [1924] P 140, at 159-160. See also, *Thompson v Australian Capital Television Pty Limited* (1996) 186 CLR 574, at 580.8 (“concurrence in the acts” not merely a “coincidence” by conjoined effect) (per Brennan CJ, Dawson and Toohey JJ), at 600-602 (per Gummow J, with whom Gaudron J agreed on the point (at 591.2)). See, also, Gummow J, in *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274, at 283.9ff, esp at 284.2, 287.8.

53. The section 136 rulings did not merely apply to the six emails, but extended to the voluminous materials seized during the course of the Search Orders and the opinion expressed by experts based upon that seized material.
54. Whatever be the position of knowledge flowing from Mr Allam to the Global/Impact parties, the position in relation to Mr Allam gaining knowledge from Global/Impact's materials is even more stark in the case (at least) of the secondary infringements: the documents are not his. It was never proved that he had received them. It was common ground that he was a service provider to the Global/Impact parties. He did not issue invoices to Global/Impact's customers.
- 10 55. With respect, paragraph [55] of Aristocrat's Submissions attempt to side step the significance of the section 136 rulings to the Full Court's "ultimate decision". The reversal of the primary judge's decision directly affects that availability of material belonging to Global/Impact to make findings against Mr Allam; in particular, the substantial volume of material (including thousands of transactions by Global/Impact over many years (PJ [537], [560], AJ [348]) in the possession of the Global/Impact parties was not available. Any knowledge which Mr Allam may have received concerning particular dealings (or which Mr Allam might otherwise have been called to explain) from this material was not available to the primary judge when assessing Mr Allam's own involvement in the transactions.
- 20 56. Thus, the section 136 rulings are fatal to Aristocrat establishing knowledge for the purposes of the two transactions pressed against Mr Allam. They are also fatal to the use Aristocrat now seeks to make of the emails (as a specific instance of the effect of the wider section 136 rulings).

F. Use of the Emails

57. It is not clear from Aristocrat's Submissions whether it seeks to use the Emails against Mr Allam. As appears from Aristocrat's Submissions at paragraph [73], the use sought to be made travels in the opposite direction.
- 30 58. Aristocrat does not explain how the emails operate to impugn Mr Allam's role in the transactions particularised against him. The submissions appear to proceed on the basis of proving that the Global/Impact Parties were aware of Mr Allam's primary infringements, which cannot inform the Tonita Parties' liability for secondary infringement.

59. If otherwise:

59.1 The Emails did not relate to any of the Impugned Transactions; Aristocrat was required to establish a relevant connection between the Emails and the transactions (AJ [177], [240]-[241]).

59.2 The only possible connection was to establish a tendency on the part of Mr Allam to participate in concert with Global/Impact of the kind to be found in the Impugned Transactions (AJ [241]). The Full Court correctly rejected this use noting the failure to comply with the requirements of section 97 of the *Evidence Act*.

10 59.3 Aristocrat did not address the tendency rule, or any exceptions to it, at any time during the either part of the full court hearing. SAJ [31]. No appeal is brought from the Full Court's refusal to entertain the application to re-open. SAJ [31]-[36].

59.4 Quite apart from this, Mr Allam brought to the attention of the primary judge the possibility that Senior Counsel for Aristocrat was attempting to deploy a tendency case in closing submissions. Instead of making an application to use that evidence for a tendency purpose, such use was disavowed.

20 59.5 Contrary to paragraph [82] and [83] of Aristocrat's Submissions, sub-section 94(3) does not excuse the requirements of section 97. Mr Allam had not himself adduced tendency evidence, and tendency was not a fact in issue. The only point at which any issue of "tendency" possibly arose was at the very point at which Aristocrat sought to tender and rely upon the emails. The pleading and the passages recited in paragraph [82] of Aristocrat's Submissions do not constitute a positive case which engages with sub-section 94(3).

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

A. Global/Impact's proposed Notice of Contention.

60. Mr Allam supports Global/Impact's proposed Notice of Contention in relation to transactions 48 and 51 (being the only two transactions now maintained against him). This concerns the 'alternative findings' made by the Full Court.

B. Mr Allam and Tonita's proposed Notice of Contention.

61. In addition to the contentions made by Global/Impact, Mr Allam seeks to impugn those passages of the Full Court's reasons where the Court considered that it was open to the primary judge to infer that the game software of each of the impugned gaming machines was a reproduction of Aristocrat's game software. For the reasons which follow, such a holding was not available on the evidence.
62. The primary judge did not conclude (because he was unable to do so on the evidence) which components in the machines the subject of the transactions were counterfeit: PJ [880]. Contrary to what appears in AJ [127], [128], [131], [132], [133], and [169], the primary judge undertook no such inference.
63. The entire basis for the primary judge's holding against Mr Allam in relation to the transactions is to be found at PJ [903]. The language used by the primary judge is precisely the formulation of authorisation ("sanction, approve, or countenance"), for the purpose of section 36 of the Copyright Act, approved by this Court in *Moorhouse*⁸.
64. If there were any doubt, the primary judge's reasoning at PJ [897], establishes that there is no relevant nexus between the precise primary infringements (because the primary judge was unable to be specific about that) and the secondary infringements. Whatever be the effect of [897], his Honour had already concluded the existence of "infringing components" (at [879]) and the impossibility at [880] of concluding on the evidence "precisely which components in the machines were counterfeit" "as I have said a number of times". In this context, the finding at PJ [902] was a finding in relation to "articles", although the primary judge did not choose to use the language of the section.
65. The inability of the primary judge to specify the precise components (noted in numerous places within the judgment; including: [846], [870], [879], [880]), reduces the scope of his Honour's findings of secondary infringement to that contained at PJ[897]: namely, infringing software.
66. In making the sweeping holding presently challenged, the Full Court overlooked the threefold problem with the determinative prominence given to the supply of software:
- 66.1 First, the evidence at trial, and accepted by the primary judge, was that some jurisdictions (his Honour accepted Peru as one such (homologated) jurisdiction) required Spanish language games (which required different software) which was

⁸ *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

not something found on any of the computers inspected below (and certainly not put to any witness or party).⁹

66.2 Second, there were licence agreements in evidence¹⁰ issued by the Aristocrat parties which entitled three companies, Flamingo Games, Corporacion Meier, and HIDE, to reproduce Spanish language games (software). These were the very people being supplied with blank EPROMs sourced by Mr Allam. The primary judge appears to have overlooked these licence agreements.¹¹

66.3 Third, only particular game software was pleaded.

10 67. Thus it follows that a finding based solely upon inferring the sale of infringing (English language) software to South American countries, in particular, Peru, is unsafe and should not be permitted to stand. As a matter of logic, whether or not there were infringing English language components, these had no value to (at least) a Peruvian customer.

68. Contrary to the submission made at trial and recorded at PJ [55]-[56], the primary judge did not accept the formulation contended for by Aristocrat. The manner in which the primary judge determined Mr Allam's liability for damages was entirely contrary to those two paragraphs. There was no finding of vicarious liability. Even if there was, it would have operated only to render the Global/Impact parties liable in relation to primary infringements.

20 69. As was submitted to the Full Court and the primary judge, and something which the Full Court appears to have accepted at AJ [132], the forensic evidence *did not* establish a direct relationship between a particular operation or use of the electronic materials and particular game software on a particular machine in a particular transaction.

70. The submissions made to the Full Court were that this electronic material was not just incapable of establishing a link, it was actually *exculpatory* of Mr Allam. This is because:

70.1 CCC-14 and the Loose HDD were in a special category; the metadata is exculpatory of Mr Allam, regardless of any credit findings which might have been made or any rejection of Mr Allam's attempt to explain how such devices might have come into his possession or his denial of any association with them. CCC-14

⁹ See PJ [133], [211], and [877].

¹⁰ Which had not been supplied to Mr Allam's lawyers until almost the end of the hearing. They were tendered as Confidential Exhibit T7 (see also Exhibit G12)

¹¹ They were referred to extensively in submissions before the primary judge: [154], [191, 195-197], [226-229], [252], [342(c)], and [Appendix C para 57].

itself was not in Mr Allam's possession. It was provided to Aristocrat by Mr Channa. The circumstances in which Mr Channa obtained it are set out in Mr Channa's evidence in chief. Mr Channa took the disc and gave it to Aristocrat. (T.513.39-514.14 AB D tab 229.06). The primary judge records that Mr Channa took the disk from Mr Allam's car ([530] AB A 333.8) although that was not the effect of Mr Channa's evidence in chief.

70.2 Save for a brief excursus at PJ [529] (in relation only to the "Georges Hall Desktop 2"), the primary judge did not demonstrate any consideration of the detailed submissions made both in writing and orally as to the impossibility of any use being made of them.

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71. In particular:

71.1 All the file dates on the loose HDD and the CCC-14 were not later than 14 November 2004. The evidence from Mr McKemmish and Mr Carson¹² confirmed this.¹³

71.2 There was evidence of Aristocrat games software on the loose HDD and CCC-14 and evidence of dataman software on the loose HDD. However there was no evidence of burning EPROMs using the loose HDD. All of the evidence suggested against it.

71.3 Even assuming a need for English language versions, as Appendix B (from the trial submissions) demonstrated, the software was not found on any of those computers with dates which indicate any use within the period.

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71.4 The evidence of the data 48xp.swp (swap) file (the only evidence of any kind disclosing EPROM burning) was from the Georges Hall Desktop 2 (the Compaq computer)¹⁴ to which Mr Channa and everyone else had access.¹⁵ All file dates associated with the Dataman program on that computer show file creation dates on a single day in July 2006. Most files indicate they were written *prior to* that date in April 2006 and most have a last accessed date of July 2006. The dataman

¹² Mr Carson's reply report supported the case which Mr Allam was seeking to make, that the material contained anomalies which told against any use at any of the relevant time periods.

¹³ Report of Mr Carson tendered as Exhibit AB – (AB D tab 80). Report of Mr McKemmish in Exhibit RDM-6.

¹⁴ McKemmish RDM-6 pages 53 and 55.

¹⁵ A contention recorded by the primary judge, without rejecting it: PJ[528].

folder event log¹⁶ showed only errors. The 48xp.swp swap file (above) records **in total** 22 attempts to burn single EPROMs. Mr McKemmish never used the program himself, so he was prepared to accept that it was possible that there were no successful attempts.¹⁷

71.5 There is no evidence from any computer from any location to support the (implicit) finding that Mr Allam (or anyone else) burned EPROMs on a large scale; or to suggest that the 1,800 or 1,900 EPROMs taken from Bankstown were created by him. It was not put to him. There was no EPROM burner found. There was no suggestion of any EPROM to EPROM copying.

10 71.6 The primary judge's findings that the EPROMs seized from Bankstown were "counterfeit" was based upon Mr Polaczek's evidence. That evidence is to the effect that he had looked at the labels (having never previously been in the field to observe what EPROM labels found in machines actually operating in clubs or hotels looked like) and when he saw labels he didn't recognise, he assumed the EPROMs to be "counterfeit". Mr Polaczek admitted in cross-examination that there was actually no way to tell objectively if the data on the EPROM is counterfeit or has been placed there by Aristocrat or one of its licensees. This, of course, was before the EPROM labels copyright infringement allegation was abandoned by Aristocrat in closing address.¹⁸

20 71.7 In any event, the dataman.swp file recorded at RDM-6 pp.56-59 (AB D tab 60) records that burning (or writing to) each EPROM took approximately 6 minutes (Mr Harrison's evidence at T.326.40-45). Each game had several EPROMs. Therefore (assuming the existence of a device) to 'burn' the 1,358 Golden Pyramids EPROMs seized¹⁹ (being the EPROMs which Mr Allam said he received from Behong, and rejected by the primary judge)²⁰ would take more than 22 working days²¹ doing nothing else.

¹⁶ (RDM-6 p 60).

¹⁷ T.664.20-666.34

¹⁸ This is recorded at PJ [713]-[715] "subject matter of claims"; curiously, the term "imitation" game software is then used: PJ [715].

¹⁹ Amended particulars, para 27.

²⁰ PJ [728].

²¹ The evidence was that Mr Allam's business operated from 8.30am until 2.30pm; being a six hour day.

72. As was submitted to the primary judge,²² the dataman software on the imaged computers and devices is not of itself sufficient to copy EPROMs. The device required to do so was not found, despite exhaustive searches of Mr Allam's house - including under the house - and other premises. No EPROM burning device of any sort (whether the dataman 48XP or any other) was found, nor any evidence indicating that such a device had been present. That is consistent with Mr Allam's denials that he did not have such a device and consistent with the submissions as to Mr Channa having exaggerated or simply misunderstood what he witnessed at the Botany workshop.
73. The purpose of EPROM labels was driven by legislative requirements. Mr Polaczek was referring to was not a copyright work, but an identification process.²³ No conclusion should have been drawn from Mr Polaczek's evidence as to genuineness of particular EPROMs can be drawn from the EPROM labels, as the Applicants' own witnesses admitted that various EPROM labels existed and that EPROM labels from time to time fell off EPROMS.
74. Most significantly, Mr Polaczek did not explain to the Court the basis for his conclusion as to which labels are copies and which are genuine.²⁴
75. There were 16 compliance plates seized from Georges Hall. Aristocrat gave evidence in relation to only 6 of those plates to assert that they were counterfeit.²⁵ Mr Parsons recorded the presence of 6 further plates, but made no allegation or complaint about them. Nothing was said at all as to the remaining four plates. The plates about which Mr Parsons gave evidence in BHP-2 were identical to those which the evidence discloses were planted by Mr Channa at Bankstown and Botany. In the circumstances, Mr Allam's evidence was that he did not know how any compliance plates came to be at Georges Hall, is plausible. Having regard to the seriousness of the allegations made, and s.140 of the *Evidence Act*, it was not open to the primary judge to simply reject that explanation and prefer Mr Channa's account (which was itself inconsistent with the January 2007 interview (the transcript of which his Honour accepted as accurate)) PJ[371].
76. Further, contrary to the evidence of Mr Parsons and Mr Harrison, the evidence in the Aristocrat scrapping records²⁶ demonstrates that Aristocrat scrapped numerous compliance plates and other game materials in the period when Behong was under

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Sub para 59.

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T389.18. Absence of a label. T389.23.

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See Polaczek 4th Affidavit para 22(c) and Ex DHP-9, p23.

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See Parsons BHP-2 p5, and BHP-2 p5 and Parsons para 60 and BHP-5.

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Exhibit C

contract to Aristocrat. Therefore it is plausible that such plates were available to Mr Channa at Behong, consistently with the evidence of Mr Allam (Aff, paras 331 and 337).

10 77. In the circumstances of a sale to South America, there was simply no need or reason to produce counterfeit (or any) compliance plates. The only evidence as to them being required was that they were required in NSW and that they were not required overseas, particularly in South America. Mr Hogg confirmed this in cross examination (T.430-431). This alone tells against any need to produce ‘counterfeit plates’ and against commercial gain were it to occur. In failing to give weight to this evidence, the primary judge fell into error which vitiates his findings concerning the probative effect of the presence of a miniscule number of ‘counterfeit’ plates.

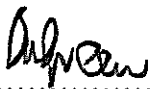
78. It follows that the electronic materials were not-inconsequential and should have featured prominently in the “totality of the circumstances” such that the primary judge’s conclusion was not justified as to the presence of infringing software in the manner over concluded by the Full Court in AJ[133] and AJ[169].

79. Mr Allam’s denials should have been accepted by the Full Court and that there was no safe evidence available to the primary judge to make the limited findings which the Full Court extended in the passages under challenge.

Part VIII – Oral Argument

20 80. The respondents estimate that approximately 10 minutes will be required for the presentation of the argument against special leave. If a grant of special leave is made, in excess of 2 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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Copyright Act 1968

Act No. 63 of 1968 as amended

This compilation was prepared on 20 December 2012
taking into account amendments up to Act No. 169 of 2012

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Parliamentary Counsel, Canberra

Division 2—Infringement of copyright in works

36 Infringement by doing acts comprised in the copyright

- (1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.
- (1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in the copyright in a work, without the licence of the owner of the copyright, the matters that must be taken into account include the following:
 - (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
 - (b) the nature of any relationship existing between the person and the person who did the act concerned;
 - (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.
- (2) The next three succeeding sections do not affect the generality of this section.

37 Infringement by importation for sale or hire

- (1) Subject to Division 3, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, without the licence of the owner of the copyright, imports an article into Australia for the purpose of:
 - (a) selling, letting for hire, or by way of trade offering or exposing for sale or hire, the article;
 - (b) distributing the article:
 - (i) for the purpose of trade; or
 - (ii) for any other purpose to an extent that will affect prejudicially the owner of the copyright; or

- (c) by way of trade exhibiting the article in public;
if the importer knew, or ought reasonably to have known, that the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of the copyright.
- (2) In relation to an accessory to an article that is or includes a copy of a work, being a copy that was made without the licence of the owner of the copyright in the work in the country in which the copy was made, subsection (1) has effect as if the words “the importer knew, or ought reasonably to have known, that” were omitted.

38 Infringement by sale and other dealings

- (1) Subject to Division 3, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, in Australia, and without the licence of the owner of the copyright:
- (a) sells, lets for hire, or by way of trade offers or exposes for sale or hire, an article; or
 - (b) by way of trade exhibits an article in public;
if the person knew, or ought reasonably to have known, that the making of the article constituted an infringement of the copyright or, in the case of an imported article, would, if the article had been made in Australia by the importer, have constituted such an infringement.
- (2) For the purposes of the last preceding subsection, the distribution of any articles:
- (a) for the purpose of trade; or
 - (b) for any other purpose to an extent that affects prejudicially the owner of the copyright concerned;
- shall be taken to be the sale of those articles.
- (3) In this section:
- article* includes a reproduction or copy of a work or other subject-matter, being a reproduction or copy in electronic form.



Evidence Act 1995

Act No. 2 of 1995 as amended

This compilation was prepared on 1 July 2012
taking into account amendments up to Act No. 132 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Part 3.11—Discretionary and mandatory exclusions

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

138 Discretion to exclude improperly or illegally obtained evidence

- (1) Evidence that was obtained:
 - (a) improperly or in contravention of an Australian law; or
 - (b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

- (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning: