



HIGH COURT OF AUSTRALIA

10 May 2013

ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LTD & ORS v GLOBAL GAMING
SUPPLIES PTY LTD & ORS; ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LTD &
ORS v ALLAM & ORS
[2013] HCA 21

On 2 May 2013, the High Court of Australia refused special leave to appeal against two decisions of the Full Court of the Federal Court of Australia in which the Full Court characterised evidence as tendency evidence, but held that it could not be relied upon as tendency evidence because there had been no compliance with the tendency evidence rule in s 97(1) of the *Evidence Act* 1995 (Cth) ("the Act") at first instance. Today the High Court delivered its reasons for refusing special leave.

The respondents were in the business of refurbishing and selling second-hand gaming machines in overseas markets. The applicants alleged that the respondents had infringed their copyright under the *Copyright Act* 1968 (Cth) by selling second-hand gaming machines assembled using pirated copies of material in which the applicants held the copyright. At first instance, a single judge of the Federal Court admitted email communications of the respondents which were used by the primary judge to satisfy the knowledge element of the alleged copyright infringements. The applicants succeeded at first instance. On appeal, the Full Court held that the primary judge had relied on those email communications to infer that the respondents had a tendency to engage in copyright infringing conduct, thereby satisfying the knowledge element of the alleged infringement. Section 97(1) of the Act provides that evidence of a person's tendency to act in a particular way is not admissible to prove that tendency unless reasonable notice is given and the court thinks that the evidence has significant probative value. As there had been no compliance with the tendency rule at first instance, the Full Court held that the email communications could not be used as tendency evidence. The applicants were unable to otherwise prove the knowledge element of the relevant infringements and the appeals were allowed.

The applicants applied for special leave to appeal the decisions of the Full Court to the High Court. The High Court held that it was open to the Full Court to characterise the primary judge's reasoning as based upon the discernment of a tendency on the part of the respondents, that the applications did not raise any question of public importance and that the Full Court's decisions were not attended with sufficient doubt to warrant a grant of special leave.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*