HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S16 of 2023

BETWEEN:

REAL ESTATE TOOL BOX PTY LTD ACN 614 827 379
First appellant

BIGGIN & SCOTT PTY LTD ACN 072 450 689
Second appellant

DREAM DESK PTY LTD ACN 604 719 735
Third appellant

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JONATHAN MICHAEL MEISSNER
Fourth appellant

PAUL GEOFFREY STONER
Fifth appellant

MICHELLE BARTELS
Sixth appellant

AND:

CAMPAIGNTRACK PTY LTD ACN 142 537 988
First respondent

DAVID SEMMENS
Second respondent

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FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Outline of oral argument

2. **Introduction**. Authorisation may be inferred from sufficient indifference: RS [48](d), [73]-[74]. It is not exclusively 'sanction, approve, countenance': RS [48]-[49].

3. Indifference refers to the authoriser's failure to take reasonable steps to prevent or avoid infringement (exhibited by acts or omissions), where they *subjectively* knew or *objectively* had reason to suspect that an infringing act had likely been done or will likely be done: *Adelaide*, 488; *Moorhouse*, 12, 21; s 36(1A)(c); FC [306]; RS [52].

10 **4.** Whether indifference is sufficient to constitute authorisation depends on **all** the circumstances of the case: *Moorhouse*, 12, 21, 24; *iiNet* [5], [63]; RS 40. These include: **(a)** The extent of the authoriser's power to prevent the doing of the infringing act (s 36(1A)(a)), which involves identifying the powers available: RS [41]. **(b)** The nature of the relationship between the authoriser and the primary infringer (s 36(1A)(b)), including its "immediacy" or proximity: *iiNet* [127]; RS [41]. **(c)** Whether the authoriser took any reasonable steps to prevent or avoid the infringing act (s 36(1A)(c)), which involves identifying the steps available and considering the objective reasonableness of taking any such step: *iiNet* [63], [135]; RS [41]. **(d)** The presence of a mental element, including the objective circumstances that actuate reason/s to suspect: *Moorhouse*, 12-
20 13; RS [41]. **(e)** These are interrelated considerations: *iiNet* [63]; RS [67].

5. Such an approach is principled and long-standing, reflecting *Adelaide*, *Moorhouse*, *iiNet*, *Jain*, *Cooper* and other authorities: RS [40]-[41], [48]-[49], [73].

6. **No error by the Full Court**. The majority correctly concluded that the appellants authorised the primary infringements (reproductions by Toolbox developers and users, in developing and using Toolbox: FC [117]-[118] CAB 200, [206] CAB 233-234), from **29 Sep 2016** to **June 2018** (a case which the Full Court unanimously accepted was before the primary judge: RS [51]), for the following reasons.

7. Each appellant *knew:* **(a)** Mr Semmens had admitted to using Process 55 to develop DreamDesk, and this had caused problems: RS [8]. **(b)** Campaigntrack had purchased
30 the intellectual property rights to DreamDesk from DDPL: AS [10], RS [15].
(c) Mr Semmens and other DDPL/JGM staff were developing Toolbox: RS [11].
(d) Mr Semmens had access to DreamDesk while developing Toolbox: RS [12].
(e) from **29 Sep–3 Oct 2016**, that Campaigntrack: **(i)** alleged there had been "improper access and duplication of code which is intellectual property now owned by [Campaigntrack] … [and] the incorporation and involvement of [RETB]"; and
(ii) sought undertakings not to use and to destroy "the intellectual property … obtained or duplicated" as a condition of granting any extension to use DreamDesk: RS [16], [18].

8. On **5–6 Oct 2016**, each appellant gave undertakings to Campaigntrack: RS [21]. The undertakings responded to Campaigntrack's allegations. Before giving the undertakings, Mr Stoner forwarded the draft undertakings to Mr Semmens, and they discussed, or possibly discussed, them: T 458.1-26 (ABFM, 6); RS [22].

9. From **5/6–10 Oct 2016**, each appellant *knew* that: **(a)** Campaigntrack repeatedly pressed for Mr Semmens' undertakings; **(b)** Mr Semmens refused or failed to give the undertakings that the appellants gave; **(c)** Campaigntrack said that refusal or failure indicated "questionable activity"; and **(d)** Campaigntrack refused to extend the DreamDesk licence beyond 10 Oct 2016 because of that refusal or failure: RS [23]-[27].

10 10. Mills Oakley's **9 Oct 2016** email demonstrates that that law firm was acting for all appellants, *including* Mr Meissner: RBFM, 46-47; *contra* AR [4].

11. On **10 Oct 2016**, the appellants launched Toolbox, while the dispute (including Mr Semmens' refusal or failure to give undertakings) remained unresolved. Real estate agents began to use Toolbox, including those in B&SC's network: RS [27]. These uses were infringements which continued until June 2018: RS [37]. The development of Toolbox also continued after launch: T 548.38-43 (ABFM, 12).

12. On **22 Oct 2016**, Mr Meissner returned from overseas: T 597.13 (ABFM, 18).

13. In **Nov 2016**, the parties agreed that an independent computer expert, Mr Geri, would inspect Toolbox and report on whether it had been copied from DreamDesk: RS [28].

20 14. On **19 Jan 2017**, Mr Geri provided a preliminary report, in which he found "significant similarities" and concluded that there was a "high probability" the DreamDesk IP had been used in the development of Toolbox. To confirm, he needed to conduct a forensic examination. Campaigntrack served Mr Geri's report and requested Toolbox be shut down: RBFM, 60-63; RS [29].

15. From **20 Jan 2017** onwards, the appellants sent correspondence in which they denied ownership of the rights, denied infringement, and refused to give Mr Geri further access to conduct a forensic examination: RBFM 62-78; RS [31]-[35]. They continued to exploit Toolbox until **June 2018**: RS [37].

16. **Statutory factors**. **s 36(1A)(a)**: Each appellant had ample power to directly influence
30 the development and ongoing use of Toolbox. Each individual appellant had the power to enquire and investigate, including to appoint experts (like Mr Geri) to help them do so. Each could ask persons other than Mr Semmens, including the other Toolbox developers (Mr Gallagher and Mr Zhang) and Ms Neal (DDPL): RS [78]-[79], [85].

17. **s 36(1A)(b)**: Each appellant was in contractual relationship with Mr Semmens, under which they could or did give directions to him on the development of Toolbox. B&SC and Mr Semmens were joint venturers in the Toolbox venture. B&SC, RETB, Mr Stoner

and Ms Bartels stood to gain financially from the development and use of Toolbox. Each of them also had relationships with Toolbox users. DDPL and Mr Meissner had contractual or employment relationships with developers: RS [80]-[82].

18. **s 36(1A)(c)**: The only evidence of "steps" taken by the appellants is the "general and unexplored evidence" of Mr Stoner's *seeking* assurances from Mr Semmens. Mr Stoner did not volunteer what Mr Semmens said in response. The appellants did not re-examine Mr Stoner or cross-examine Mr Semmens. Mr Stoner and Ms Bartels did not give affidavit evidence about the subsequent correspondence and Mr Geri's report. Inferences from that correspondence and report support the majority's conclusion;
10 namely, that the appellants took no reasonable steps to prevent or avoid the infringements: RS [83]-[84].

19. **Flaws in appellants' argument**. *First*, the appellants misstate authorisation as requiring something to "transform" their subjective trust of no infringement into implicit endorsement of conduct: AR [14]. That is not the test: RS [47]-[49].

20. *Secondly*, the appellants contend their trust in Mr Semmens and Mr Stoner's *seeking* (not *receiving*) assurances are dispositive and un-displaceable, contrary to [4] S1 above.

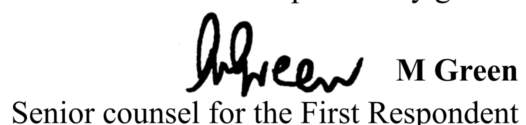
21. *Third*, the appellants only examine the week from **29 Sep 2016** until they gave their undertakings on **5-6 Oct 2016**: AS [56] lines 14-16, [58] *chapeau*; AR [14]. They ignore the subsequent conduct which is integral to the majority's reasoning in FC [330]-[341]
20 CAB 268-272. It follows that the appellants are wrong to suggest the majority did not consider this extensive subsequent conduct: AR [4] lines 19-20; *cf.* FC [333]-[336].

22. *Fourthly*, as a result, the appellants do not address the position after **6 Oct 2016**: namely, they then knew Mr Semmens was refusing to provide the undertakings and thus, in the circumstances, a reasonable person in their respective positions would *suspect* that Mr Semmens had likely done or would likely do infringing acts: FC [334] CAB 270. This approach is consistent with *Adelaide*, *Moorhouse*, *iiNet* and *Jain* because those decisions hold that reasons to suspect are relevant.

23. *Fifthly*, the appellants erroneously limit s 36(1A)(a) to '*direct*' powers to prevent: RS [76]. They also conflate power with knowledge: RS [77]. Together, their approach
30 distorts the operation of the mandatory factors in ss 36(1A)(a) and 36(1A)(c).

24. *Finally*, *if*, as they now seem to assert, the appellants' undertakings "replicated" or were "built … upon" the "stipulations" in the 3 Aug Letter (AS [57]), *then* their actual knowledge that Mr Semmens had refused or failed to give the same undertakings assumes greater significance: namely, they now knew that Mr Semmens was no longer willing or able to give them any assurance, whatever assurance he had previously given.

Date: 1 August 2023



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