



HIGH COURT OF AUSTRALIA

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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

10 **JONATHAN MICHAEL MEISSNER**
Fourth appellant

PAUL GEOFFREY STONER
Fifth appellant

MICHELLE BARTELS
Sixth appellant

AND:

CAMPAIGNTRACK PTY LTD ACN 142 537 988
First respondent

20 **DAVID SEMMENS**
Second respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. This appeal provides the opportunity for this Court to state the principle to be applied to determine a person's liability for the statutory tort of authorisation of primary infringement under s 36(1) of the *Copyright Act 1968* (Cth) and cognate provisions within that Act and other intellectual property legislation.

30 3. In particular, this appeals asks, in the context of unchallenged factual findings by the primary judge, whether authorisation of infringement of copyright under s 36(1) of the *Copyright Act* may be imposed on persons by imputing to them "*indifference*" on account of their failure to inquire about supposed infringement where such inquiry would be counter to current stipulations and expressed intentions made clear to the primary infringer by those persons, in such a way as to contradict any indifference on their part to the possibility of infringement?

Part III: Section 78B Notice

4. No s 78B notice is considered necessary.

Part IV: Citations

5. The reasons of the primary judge (Thawley J) are reported as *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2021) 160 IPR 362 (PJ). The reasons of the Full Court (Greenwood, Cheeseman and McElwaine JJ) are reported as *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 402 ALR 576, 167 IPR 411 (FC).

Part V: Material facts

10 6. The subject matter of the proceedings was copyright in computer source code, database tables and PDF templates (as literary works) in an online system for the creation of real estate advertising materials called “*DreamDesk*” {PJ [1] CAB 13; FC [162] CAB 219}.

7. The DreamDesk system was proposed by the second respondent (**Mr Semmens**) to the fourth appellant (**Mr Meissner**) who agreed to fund the venture. This was pursued through the third appellant (**DDPL**) of which Mr Meissner was the sole director and to which Mr Semmens was a contractor who worked on technical and software development {PJ [14]-[15] CAB 16; FC [171] CAB 221}.

20 8. The second appellant (**Biggin & Scott**), of which the fifth appellant (**Mr Stoner**) and the sixth appellant (**Ms Bartels**) were directors, agreed to move the Biggin & Scott group of real estate agencies to DreamDesk {PJ [3(e)], [17] CAB 14, 17; FC [170], [172] CAB 221}. The agreement between Biggin & Scott and DDPL acknowledged that “*at all times any templates or data relating to properties and staff put into Dream Desk remains the property*” of Biggin & Scott or the agency office {PJ [18] CAB 17; FC [172] CAB 221}. Biggin & Scott went live with DreamDesk in August 2015 {PJ [19] CAB 17; FC [172] CAB 221}. Biggin & Scott had previously used an online system offered by the first respondent (**Campaigntrack**) {PJ [16] CAB 16-17; FC [162], [172] CAB 219, 221}.

30 9. In May 2016, Mr Meissner was shocked to discover that Mr Semmens had used a third party’s software called “*Process 55*” in DreamDesk to produce and edit PDF images used in real estate marketing campaigns {PJ [24], [305(1)] CAB 18, 104-105; FC [173] CAB 221-222}. Mr Meissner did not want to operate using intellectual property he or DDPL was not authorised or licensed to use, and he decided either to buy Process 55 or to sell DreamDesk {PJ [25] CAB 18; FC [174] CAB 222}.

10. Campaigntrack, however, entered agreements in July and August 2016 to buy Process 55 and DreamDesk in order to shut DreamDesk down and entice those clients to Campaigntrack {PJ [27] CAB 19; FC [175] CAB 222}. Those arrangements contemplated the DreamDesk system continuing from DDPL for its clients under licence from Campaigntrack until 3 October 2016 {PJ [34] CAB 21; FC [175]-[176] CAB 222}.

11. On 3 August 2016, Mr Semmens told Mr Stoner he could create a system with similar functionality to DreamDesk and Campaigntrack {PJ [38] CAB 23; FC [177] CAB 222-223}. Mr Stoner’s letter to Mr Semmens stipulated:

10 *“You are instructed to build a web to print delivery system that does not breach any other companies IP or ownership, in particular Dream Desk or Campaign Track.*

All products used should be off the shelf products owned by 3rd parties with a licence agreement or able to be used through open code or any other industry standard that classes the use as open (can not be claimed).

...

In simple terms we do not want any thing used that can be claimed as owned by the 2 companies above.

We are happy with E-DOC being used as the PDF delivery system”

20 **12.** In cross-examination, when put that he did not ask Mr Semmens for an assurance that he had complied with this directive, Mr Stoner’s evidence was that he “*probably asked him every two days*”. Further, when put that he “*trusted [Mr Semmens] and left it to him*”, Mr Stoner’s evidence was that he “*asked him constantly*” {FC [285] CAB 255}. That evidence was neither pursued nor challenged.

13. The primary judge found that it was “*hardly surprising Mr Stoner would seek an assurance from Mr Semmens that he would not infringe the intellectual property rights of others in building*” a new system. His Honour was satisfied that “*Mr Stoner trusted Mr Semmens not to infringe the intellectual property rights of DDPL or Campaigntrack in developing the new system*”. Further, he concluded that Mr Stoner “*did not want Mr Semmens to misuse intellectual property belonging to others in developing the new system*” {PJ [43] CAB 25; FC [181] CAB 224}.

30 **14.** Similarly, the primary judge concluded that Ms Bartels, who had left the specifications of the new system to Mr Semmens, did not want him to misuse intellectual property belonging to others in developing the new system {PJ [44]-[45] CAB 25}.

15. In August and September 2016, Mr Semmens ran migration scripts that transferred data owned by the client but which did not, of themselves, copy any intellectual property owned by Campaigntrack {PJ [64] CAB 31}.
16. After the purchase price was paid on 6 September 2016, Mr Meissner went abroad {PJ [83], [94], [96]-[97] CAB 35-41}.
17. The first appellant (**RETB**) was incorporated on 15 September 2016 as the vehicle to pursue the new “*Toolbox system*” venture {PJ [70], [91] CAB 32, 39; FC [186] CAB 226}.
18. Mr Stoner’s preference was that the new system would be operational by 3 October 2016 (the end of the licence-back) but that, if it was not, another service provider might be required and Campaigntrack was the least preferred option {PJ [72]-[73], [86(3)] CAB 32-33, 38; FC [182] CAB 224}.
19. After a request on 21 September 2016 for more time, Mr Stoner told Campaigntrack on 26 September 2016 that Biggin & Scott would not be entering into a contract with Campaigntrack and asked for an extension of 4 weeks to help with the transition {PJ [98], [102], [107]-[108] CAB 40-43, 44; FC [188] CAB 226}.
20. On 29 September 2016, Campaigntrack, through its solicitors, sent a letter to Mr Meissner and DDPL asserting without particulars, among other things, “*improper access and duplication of code*” but also indicating a willingness to give a 1 week extension if undertakings were given “*by all relevant parties*”, although those parties were not specified {FC [189] CAB 226-227}.
21. On 3 October 2016, having been provided with a copy of the letter to Mr Meissner and DDPL, Biggin & Scott, through its solicitors, asked for an extension of the licence and confirmed it was willing to provide Campaigntrack certain undertakings {PJ [121] CAB 47; FC [191] CAB 228}.
22. Forms of undertakings were provided by Campaigntrack’s solicitors to Mr Meissner and Biggin & Scott on 5 October 2016 {PJ [129], [131] CAB 48-49; FC [191] CAB 228}. On the same day, Mr Meissner accepted its terms {PJ [130] CAB 48-49; FC [192] CAB 228-229}. Mr Stoner and Ms Bartels signed the undertakings on behalf of Biggin & Scott, RETB and themselves on 6 October 2016 {PJ [132] CAB 49; FC [194] CAB 229-230}. Mr Stoner was not aware that Mr Semmens had also been asked to give an undertaking and thought that, by giving it, an extension would be granted {PJ [133] CAB 49; FC [193] CAB 229}. Mr Semmens

did not sign them, and his evidence was that he was not instructed by anyone else not to do so {PJ [134] CAB 49-50; FC [193] CAB 229}.

23. Following correspondence on 7 October 2016, Biggin & Scott’s access to DreamDesk was turned off on 10 October 2016 {PJ [144]-[145], [147] CAB 52-53; FC [195]-[196] CAB 230}. The Toolbox system also went live on that day {PJ [148] CAB 54; FC [198] CAB 231}.

24. In November 2016, and in response to a request from Campaigntrack, it was agreed that an independent forensic IT expert, Mr Geri, would inspect the Toolbox system and report on whether there was any potential copying from the DreamDesk system {PJ [152] CAB 54; 10 FC [199] CAB 231}. Two inspections by Mr Geri were facilitated by Biggin & Scott {FC [155], [200] CAB 214, 231}.

25. In a preliminary report of 19 January 2017 in relation to his instructions regarding the “*potential copying or duplication of any intellectual property*”, Mr Geri stated his opinion that there was a “*high probability that intellectual property purchased by Campaigntrack has been used in the development of ... Toolbox*” because both applications had been “*developed by the same developer who had access to both systems during the development process*”. He could not come to a concluded view based on his expertise without further forensic examinations being conducted {FC [156]-[157]; [202] CAB 215, 232}. There was no meaningful cross-examination, if at all, of Mr Stoner, Ms Bartels or Mr Meissner on the substance of Mr Geri’s 20 preliminary report {FC [158] CAB 215-216}.

26. RETB ceased to trade, and ceased to use the Toolbox system, in about June 2018 {PJ [162] CAB 57; FC [205] CAB 232-233}.

Primary infringements

27. The primary judge found, not disturbed on appeal, that Mr Semmens had infringed the copyright in the DreamDesk source code, database and database tables and PDF templates by acts of reproduction of the whole or substantial parts of those works {PJ [279]-[286] CAB 94-96; FC [206] CAB 233}. Despite expressing some doubt as what the evidence reliably established at the time it went live and subsequently, his Honour also found, again undisturbed, that the use of the Toolbox system involved a reproduction of a substantial part of the 30 DreamDesk source code, database and database tables {PJ [290] CAB 97}.

28. There was no finding that any of Mr Stoner, Ms Bartels (and, through them, Biggin & Scott and RETB) or Mr Meissner (and DDPL) were aware of the steps taken by Mr Semmens to cover his tracks {PJ [69], [128], [154], [155], [156], [278(1)], [278(3)], [278(4)], [278(5)] CAB 32, 48, 55-56, 92-93; FC [155] CAB 55}.

Primary judge's rejection of the authorisation case

29. As against RETB, Biggin & Scott, Mr Stoner and Ms Bartels: the primary judge referred to the stipulations given by Mr Stoner to Mr Semmens, the assurances Mr Stoner sought from Mr Semmens that “*he would not infringe the intellectual property rights of others*”, Mr Stoner’s trust in Mr Semmens that he would not do so and Mr Stoner’s and Ms Bartel’s desire that that there be no misuse of intellectual property rights of others {PJ [297(1)-(3)] CAB 101-102}.

30. Mr Stoner and Ms Bartels “*considered Mr Semmens to be a person who had the relevant expertise in building a software system with the relevant functionality*” and who “*could build the system in sufficient time given his expertise*” and they “*wanted him to do so without infringing the intellectual property rights of others*” {PJ [297(1)] CAB 101}. Leaving the development to Mr Semmens was “*not unusual*” and the decision to use him was “*not surprising*” as they knew he had the relevant expertise and familiarity with the kind of product they wanted, and he was a “*logical choice for developing the software in the required timeframe*” provided they were satisfied he would do so without infringing the intellectual property rights of others {PJ [297(2)] CAB 101-102}.

31. While no independent audit or verification was conducted, this was a reflection of the facts that the stipulation had been given, they trusted “*there would be no infringement*” and while “*in all likelihood, neither turned their mind to whether an independent audit should be carried out*”, there was a lack of ready means to carry out an independent audit in the time frame which would have been required {PJ [297(4)] CAB 102}.

32. After referring to *University of New South Wales v Moorhouse* (1975) 133 CLR 1, his Honour found it was *not* established that RETB, Biggin & Scott, Mr Stoner or Ms Bartels “*knew (or that they should reasonably have known) that any of the works had been reproduced in the Toolbox system*” or that its use might involve reproductions of a substantial part of DreamDesk. His Honour distinguished this case from those like *Moorhouse* and was *not* satisfied that Biggin & Scott, RETB, Mr Stoner or Ms Bartels “*authorised any infringement, whether of Mr Semmens or of other developers or users*” {PJ 300] CAB 103}.

33. *As against DPPL and Mr Meissner:* as Mr Meissner’s evidence made plain that “*he was shocked to discover*” that Mr Semmens had used Process 55 in DreamDesk, his Honour did *not* accept that “*having been surprised in that way, and having been effectively forced to sell the intellectual property rights in DreamDesk, he then participated in developing a new system, in competition with the purchaser of DreamDesk, in a way which infringed the intellectual property rights just transferred*” {PJ [305(1)] CAB 104-105}.

34. It was not an indicium of authorisation for Mr Meissner to leave others to turn DreamDesk off, given he was overseas for a substantial part of events and contact was likely to have been “*sporadic and difficult at various times*” {PJ [305(2)] CAB 105}.

10 **35.** While Mr Meissner had power to prevent infringements by not paying for work or invoices, the primary judge did not accept that Mr Meissner “*believed that infringements were occurring or that there was anything to prevent*” {PJ [305(4)] CAB 105}. Mr Meissner did not know of any events which called for his (or DDPL’s) intervention, as Mr Semmens had the relevant expertise and Mr Meissner did not. It was reasonable for Mr Meissner to take the view that Mr Semmens would not engage in improper use of intellectual property again and, so, the “*circumstances known to Mr Meissner did not call for some active audit or investigation on his own part during the process of development of Toolbox*” {PJ [305(6)] CAB 105-106}. Authorisation was not made out.

Full Court

20 **36.** An appeal was allowed by majority of Greenwood J and McElwaine J, with Cheeseman J dissenting. Relevantly, Greenwood J agreed with McElwaine J, while also making some additional observations in respect of RETB, Biggin & Scott, Mr Stoner and Ms Bartels in respect of which McElwaine J did not join {FC [15] CAB 181}. Accordingly, the reasons of McElwaine J were dispositive of the appeal. Importantly, none of the primary judge’s primary findings was challenged in the Full Court.

30 **37.** The critical reasoning is at FC [330]–[339] CAB 269-272. The steps in that reasoning are: *first*, the letter of 29 September 2016 placed the appellants on notice of Campaigntrack’s assertions {FC [330], [332] CAB 268, 269}; *secondly*, this should have reasonably caused each of the appellants to make “*specific inquiries*” of Mr Semmens or “*to have more carefully and fully investigated those claims*” {FC [330], [332] CAB 268, 269}; *thirdly*, those “*specific inquiries*” should have been made before giving the undertakings on 5/6 October 2016 that Campaigntrack asked the appellants to give {FC [332], [333] CAB 269}; *fourthly*, agreeing to

the appointment of an independent expert in November 2016 was appropriate but “*taken at too late a point in time*” {FC [334] CAB 270}; *fifthly*, the appellants should have preferred the assertions made by Campaigntrack’s solicitors over their interests {FC [334]–[335] CAB 270}; *sixthly*, the appellants should have taken steps to “*get to the bottom of the allegations*” and, if substantiated, they should have exercised the power to end the contractual and commercial relationship with Mr Semmens {FC [338] CAB 271}. The errors in that reasoning are set out below.

Part VI: Argument

Authorisation

10 **38.** Infringement of copyright in works is the subject of Div 2 of Pt III of the *Copyright Act*. Section 36(1) relevantly provides for two types of infringement of the copyright in a literary work by a person who is not the copyright owner and does not have the owner’s licence: *first*, where the person does any act comprised in the copyright; *secondly*, where the person authorises the doing of any such act.

39. By s 13(1), the acts comprised in the copyright in a literary work are those which the Act gives the owner of the copyright the exclusive right to do. By s 13(2), the exclusive right to do an act in relation to a literary work includes the exclusive right to authorise a person to do that act.¹ The exclusive rights in relation to a literary work are in s 31(1)(a) and, relevantly for this appeal, include the right to reproduce the work in a material form (subpara (i)).

20 **40.** Infringement by authorisation under s 36(1) is a separate statutory tort, distinct from primary infringement: *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42 at [42], [103], [105] (considering the cognate provisions in s 101(1)-(1A) in respect of copyright in subject matter other than works). It is also distinct from liability under common law principles of joint tortfeasorship: *Roadshow v iiNet* at [100].

41. Authorisation has the meaning of “*sanction, approve, countenance*”: *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 491; *Adelaide Corp v Australasian Performing Right Association Ltd* (1928) 48 CLR 481 at 489, 497; *UNSW v Moorhouse* (1975) 133 CLR 1 at 12, 21. An alleged authoriser must have power to prevent the primary infringements: *Roadshow v iiNet* at [69]. Power here is a direct power to prevent the infringements and is not the exercise

¹ Similar provisions with respect to authorisation exist in other statutes in intellectual property: *Patents Act 1990* (Cth), s 13(1); *Trade Marks Act 1995* (Cth), s 20(1)(b); *Designs Act 2003* (Cth), s 10(1)(f).

of an indirect power to prevent, including by ending the parties' legal relationships: *Adelaide v APRA* at 499 and 502, 504-505; *Roadshow v iiNet* at [48], [77]-[78].

10 **42.** This meaning (“*sanction, approve, countenance*”) embodies the central concept that inheres in the statutory text of authorisation of infringement: that is to say, the existence of a position or attitude by a person of explicit or implicit endorsement as to the occurrence, or likely occurrence, of the wrongful acts of another where that person has power to stop those acts. Broader or wider meanings derived from the adoption of synonyms or aspects of the ordinary definition, such as countenance, are “*remote from the reality of authorisation which the statute contemplates*” and impermissibly “*seek to expand the core notion of ‘authorise’*”: *Roadshow v iiNet* at [68], [125].

43. Section 36(1A) sets out the “*matters that must be taken into account*” in determining whether a person has authorised an act of primary infringement. Those matters are: the extent (if any) of the person’s power to prevent the doing of the act concerned; the nature of any relationship existing between the person and the primary infringer; and whether the person took any reasonable steps to prevent or avoid the doing of the act.

20 **44.** The subsection was introduced by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). The Explanatory Memorandum stated (at paras 122-124) that it partially codifies the principles at common law in relation to authorisation by reference to *Moorhouse: Roadshow v iiNet* at [22], [133]. Two points should be made. *First*, while the facts and circumstances in subs (1A) are mandatory considerations, they are intended to inform the drawing of an inference as to authorisation and are not exhaustive: *Roadshow v iiNet* at [68], [135]. *Secondly*, there is nothing in the statutory text nor the Explanatory Memorandum to suggest that the partial codification of principles was to effect any change in the core notion of authorisation.

45. The analytical task called for by s 36(1A) was described by Gummow and Hayne JJ in *Roadshow v iiNet* at [135]. The subsection is “*so drawn as to take an act of primary infringement and ask whether or not a person has authorised that act of infringement*”. This reflects the textual focus in ss 13, 31 and 36 on the exclusive rights to do an act comprised in the copyright. Their Honours continued:

30 “... *In answering that question, there will be ‘matters’ that must be taken into account. These include, but are not confined to, the matters identified in paras (a), (b) and (c). Was there any relationship that existed between the primary infringer and the (alleged) second infringer? If so, what was its nature (para (b))? Did the secondary infringer have power to prevent the primary infringement; if so, what was the extent of that power (para (a))? Other than the exercise of that power, did the secondary infringer take any*

reasonable steps to prevent the primary infringement, or to avoid the commission of that infringement (para (c))?

10 **46.** This passage exposes the interrelationship between the three non-exhaustive factors. The ultimate question is whether, in all the circumstances, B authorised A’s infringement. While the degree of B’s direct power to prevent the infringements must be considered, there can be no authorisation where no such power exists: *Roadshow v iiNet* at [69]. The assessment of power will be informed in part by the relationship between B and A and its nature: e.g., principal and agent²; employment³; director and company⁴; contractual⁵; manufacturer/supplier and consumer⁶; internet service provider and customer⁷; or general permission⁸. These examples are not exhaustive.

20 **47.** In addition, aspects of the relationship will include B’s knowledge of the occurrence, or likely occurrence, of the acts of primary infringement and the taking, or failure to take, reasonable steps to prevent those acts: *Moorhouse* at 12, 21; *Cooper v Universal Music Ltd* (2006) 156 FCR 380 at [146]. This is sound in logic and principle: B cannot prevent, or take reasonable steps to prevent, that which B does not know A is doing or is likely to do. It is insufficient for B to know that A *might* infringe the copyright and take no step to prevent it: *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399 at 422G. In the context of the statutory tort, knowledge here refers to actual and constructive knowledge or wilful blindness but does not extend further: this is the effect of *Moorhouse* at 12-13; *Adelaide v APRA* at 487 and *Roadshow v iiNet* at [78], [107]-[110], [138] and [146].

48. As to “*indifference*”, this stems from the passage of Bankes LJ in *Ciryl*⁹, cited in *Adelaide v APRA* and *Moorhouse*. His Lordship accepted that authorisation may be inferred “*from acts which fall short of being direct and positive*” and went on to say that “*indifference, exhibited by acts of commission or omission, may reach a degree from which authorisation or permission may be inferred*” (emphasis added). This does not stand for a different proposition

² *Monaghan v Taylor* (1886) 2 TLR 685, considered in *Performing Right Society, Ltd v Ciryl Theatrical Syndicate, Ltd* [1924] 1 KB 1.

³ *Australasian Performing Right Association Ltd v Miles* (1961) 3 FLR 147.

⁴ *Australasian Performing Right Association Ltd v Jain* (1990) 26 FCR 53.

⁵ *Falcon*, in which the “*immediacy ... of the relationship between the primary infringement and the secondary infringement*” was emphasised by Gummow and Hayne JJ in *Roadshow v iiNet* at [127]; see also *Adelaide v APRA*.

⁶ *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 and *CBS Songs Ltd v Amstrad Plc* [1988] AC 1013.

⁷ *Roadshow v iiNet*.

⁸ *Moorhouse*.

⁹ *Ciryl* [1924] 1 KB 1 at 9.

with respect to authorisation. In particular, it does not establish an identifiable species of authorisation characterised by an attitude of “*indifference*”, even in its “*dyslogistic sense*” (to which Higgins J referred in *Adelaide v APRA* at 504). So much is made plain from his Lordship’s decision (at 10) in which he held that the “*indifference*” of the syndicate’s managing director “*was emphatically not of a kind to warrant the inference of authorization*”.

10 **49.** *Adelaide v APRA* is to similar effect. Both Knox CJ (in the minority) and Higgins J (in the majority) approved the formulation of the Full Court of the Supreme Court of South Australia that indifference or omission may rise to the level of authorisation or permission where the alleged authoriser knows or has reason to suspect that the particular act is to be or is likely to be done, has the power to prevent it, makes default in some duty of control or interference arising under the circumstances and thereby fails to prevent it: see at 487, 497; see also Gavan Duffy J and Starke J at 504-505.

50. The use of epithets such as “*indifference*” is apt to distract from the statutory inquiry as to whether a person has authorised the acts of primary infringement. It risks the imposition on persons of liability for authorisation of copyright infringement at a threshold that is far removed from the central concept of authorisation.

Campaigntrack’s case on infringement by authorisation

20 **51.** Campaigntrack’s case of primary infringement against the appellants on the basis that Mr Semmens’ acted as their agent was rejected {PJ [294]-295] CAB 99; PJ [302] CAB 103-104} and was not the subject of appeal {FC [229] CAB 239}.

52. Before both the primary judge and the Full Court, Campaigntrack argued that there was no mental element required for authorisation. This was rejected {FC [227], [232]-[270] CAB 239, 240-251}. There is no notice of contention.

30 **53.** Campaigntrack contended that the primary judge should have inferred that the appellants “*had reason to suspect that Mr Semmens might copy DreamDesk or knew there was a real risk he might do so*” {FC [281] CAB 239}. This was based on the cross-examination of Mr Stoner which was put only on the basis of a “*real risk*” of a possibility (“*might*”) {PJ [41] CAB 24; FC [277] CAB 253}. From this, Campaigntrack contended that authorisation should be found for the period 3 August 2016 to June 2018 on the basis that the appellants had “*deliberately and clandestinely participated in [the]development [of Toolbox], [and] obfuscated their true intent in seeking to extend their ability to use [Campaigntrack’s] copyright works until their purpose was complete*” {FC [286] (quoting from para 8 of

Campaigntrack’s note) CAB 255-256}. This case was rejected: it was not pleaded and it was not put either fairly or at all to the witnesses for the appellants in cross-examination {FC [287] CAB 256}. A finding of “*serious and concealed misconduct*” was not open in the light of the unchallenged factual findings {FC [288] CAB 256}.

54. Similarly, it was no part of Campaigntrack’s case that the appellants had been wilfully blind {FC 287}, [314]-[320] CAB 256, 263-265}.

55. With no challenge to the primary judge’s factual findings, Campaigntrack’s case on authorisation in the Full Court became reduced to one of inference based on “*indifference*” said to arise from the letter of 29 September 2016 (see para 20 above). For the following reasons, the majority of the Full Court erred in accepting that case.

Errors

56. The majority’s dispositive reasoning is set out above. Essential to that reasoning is the proposition that persons may be liable for infringement by authorisation under s 36(1) of the *Copyright Act* because, after receipt of an unparticularised assertion of an infringement, those persons did not investigate the cogency of the apprehension that Mr Semmens was infringing *before* they complied with a demand to give undertakings not to infringe notwithstanding that: it had been expressly stipulated to Mr Semmens there was to be no infringement (and it was not suggested this stipulation was disingenuous or otherwise a sham); assurances from Mr Semmens that there were to be no infringements had been sought constantly (and it was not suggested this was not ongoing); it was not put to the witnesses that they gave the undertakings for the ulterior purpose of concealing conduct that comprised infringement {FC [154], [286]–[288] CAB 214, 255-256}; and there was no case of “*serious and concealed misconduct*” or wilful blindness.

57. The majority’s finding of infringement by authorisation by way of indifference is built, counter-intuitively, upon the foundations that the appellants gave their express promise to Campaigntrack not to infringe its intellectual property (as Campaigntrack had asked them to do), a promise which replicated the express stipulations that had been given to Mr Semmens not to infringe any intellectual property rights and reflected the trust and expectation that he would not do so. Allegations that the appellants had breached the promise in the undertakings they gave by reason of, among other things, the same infringements of copyright were rejected by the primary judge {PJ [350]–[359] CAB 119-121} and were not the subject of appeal. The

breach of undertaking case cannot be resurrected by obiter comments made in the context of consequential matters said to flow from the majority's decision {FC [342] CAB 272}.

58. Any failure to cause further or other “*specific inquiries*” (of apparent indeterminate content) to be made of Mr Semmens in the period between the first bland assertion of impropriety (29 September 2016) and the provision of the undertakings (5/6 October 2016), or even thereafter, cannot transform express disapprobation into indifference giving rise to statutory liability for infringement given:

- (a) *first*, the appellants' provision of the undertakings, in which they acknowledge Campaigntrack's ownership of copyright, tells against any implied authorisation;
- 10 (b) *secondly*, the witnesses were not confronted with this in cross-examination (see Appellants' Book of Further Materials at pp 3-9 (Mr Stoner), 10-15 (Ms Bartels) and 16-17 (Mr Meissner); *cf.* FC [356] CAB 277);
- (c) *thirdly*, there is no logical reason to suppose that the response to any such hypothetical inquiry would have yielded any different answer to that given in response to Mr Stoner's requests for assurances or provoke any change in position to that which Mr Semmens maintained throughout, including at trial and until judgment, namely that there was no infringement;
- (d) *fourthly*, the findings were that Mr Semmens, on his own and acting without
20 instructions, took deliberate steps to conceal what he did so that his acts could not be discovered. The primary judge accepted so much of Campaigntrack's case that Mr Semmens copied DreamDesk and progressively modified it, and took steps to conceal that conduct in order to prevent access to those files by Campaigntrack {PJ [118], [168], [278], [280]-[281] CAB 46, 58, 92, 94-95};
- (e) *fifthly*, and relatedly, in these circumstances, it cannot be said that any of the appellants possessed the relevant direct power to prevent Mr Semmens' acts of infringement (comprising acts of reproduction) including because they did not have the requisite knowledge that those acts were being done or were likely to have been done. The findings of trust preclude such a conclusion. The position is the same with respect to acts of infringements by users of Toolbox (also comprising acts of reproduction) as they
30 are merely derivative {PJ [290] CAB 97};

(f) *sixthly*, the point is compounded insofar as Mr Meissner and DDPL are concerned given that Mr Meissner had completed the sale of DreamDesk on 6 September 2016 and was then overseas, and where a non-infringing Toolbox was the endeavour of the other appellants. The Full Court appears to have subsumed the position of Mr Meissner and DDPL with that of the other appellants, including by wrongly attributing to them the same solicitor which was not so {FC [333] CAB 269}.

10 **59.** The effect of the majority’s finding that the appellants exhibited “*indifference*” amounting to authorisation by a failure to make inquiries as to the reality of an asserted infringement is to extend the scope of potential liability under the statute by imposing a duty upon persons in that position to investigate for themselves the possibility of infringement even though there was, in the circumstances, no cue that called for investigation and the person allegedly infringing has already, and consistently, been told not to do so.

60. The imposition of such a duty and the consequences of its apparent non-performance resulting in statutory liability for infringement on account of “*indifference*” suffers the vice identified in *Roadshow v iiNet* at [68] and [125]. It takes the most remote element (indifference) of the broadest part (countenance) and, by that combination, fixes liability in a manner disconnected to the well-established core conception of authorisation being “*sanction, countenance or approve*” and “*remote from the reality of authorisation which the statute contemplates*”.

20 **61.** The majority of the Full Court became distracted from the statutory question by considerations as to what, in their view, the appellants could (query, should) have done so as to avoid infringement. That is not the statutory inquiry. The question is whether, in all the circumstances, the appellants authorised the specific acts of primary infringement identified in the declarations. On the unchallenged factual findings, the answer to that question was no, as the primary judge held. The majority of the Full Court was therefore wrong to substitute their own view of the appellants’ conduct for that of the primary judge by reference to the asserted consequences of the letter of 29 September 2016 (see paras 20-22, 37 and 55-56 above).

30 **62.** In contrast, the dissenting judgment of Cheeseman J correctly explains why the primary judge’s conclusion is free from appealable error and starkly exposes why the majority of the Full Court wrongly interfered with it. As her Honour noted {FC [150] CAB 212, referring to PJ [297], [299], [300] and [305] CAB 101, 103, 104-105}, the primary judge’s multiple unchallenged trust findings are “*not temporally limited and are made in the context of the*

primary judge’s assessment of the whole of the evidence, including the case put in cross-examination of the witnesses” for the appellants.

10 **63.** Further, the findings made by the primary judge concerning the response to that letter showed that he was aware of and considered the letter {FC [151] CAB 213}. The commercial history and background between Biggin & Scott and Campaigntrack provide the context in which the allegations in the letter are to be seen {FC [152] CAB 213}. In response to the letter, the appellants “*took active steps to cooperate*” with Campaigntrack by giving the undertakings and by granting access to an independent expert whose preliminary report contained “*nothing ... that was capable of displacing the subsisting relationship of trust that was capable of confirming the allegations of infringement in the 29 September 2016 letter were well made*”, especially where there was no meaningful cross-examination, or at all, of any of the appellants’ witnesses on that report {FC [153]-[159] CAB 214-217}.

64. Her Honour correctly concluded that the absence of an express finding as to the existence of the 29 September 2016 letter was immaterial, “*demonstrated by the nature and quality of the evidence in issue, the context setting of the comprehensive trust findings, the scant attention given to the evidence in the way in which [Campaigntrack] put the case below and the inadequacy of any cross-examination of relevant witnesses on this evidence*” {FC [160] CAB 217}.

Amendment application

20 **65.** The appellants apply for leave to file an amended notice of appeal and for a consequential order correcting the name of the second appellant (CAB p 347) and rely on the affidavit of Mr Andrew Brown sworn 3 April 2023 (CAB p 349-378). The amended notice of appeal is at Exhibit APB-3 at pp 17-18 (CAB 366-367). Campaigntrack consents to both: see Mr Brown’s affidavit at para 11, Exhibit APB-5 at p 28 (CAB 352, 377).

30 **66.** The substantive amendment is to grounds 1(a) and (b) of the notice of appeal. The purpose of the amendment is to address a problem in the original formulation of those grounds which meant that the acts of infringement the subject of paras 3(a)(i)(C) and 3(a)(ii)(A) of the declarations made by the Full Court were inadvertently omitted. This was not the intention. See Mr Brown’s affidavit at paras 7-9 (CAB 351-352). The amendments correct that problem and do not otherwise affect the subject of the appeal.

67. The name of the second appellant was incorrectly identified in the orders of the Federal Court. This has now been corrected: see Mr Brown's affidavit at para 10, Exhibit APB-4 at pp 23-26 (CAB 352, 372-375); para 12, Exhibit APB-6 at pp 31-32 (CAB 379-381).

Part VII: Orders sought

68. The appellants seek the following orders:

- (1) Appeal allowed with costs as against the first respondent.
- (2) Set aside the orders of the Full Court of the Federal Court made on 6 July 2022 and 19 July 2022 and, in their place, order that the appeal be dismissed with costs.

Part VIII: Estimate

10 69. The appellants estimate that they require 2 hours to present their oral argument.

Dated: 11 April 2023



Bret Walker
Fifth Floor St James' Hall
Tel: 02 8257 2527
caroline.davoren@stjames.net.au



H P T Bevan
Nigel Bowen Chambers
Tel: 02 9930 7954
hptbevan@nigelbowen.com.au



J E McKenzie
Nigel Bowen Chambers
Tel: 02 9930 7978
j.mckenzie@nigelbowen.com.au

ANNEXURE
List of Relevant Statutory Provisions

No.	Title	Section(s)	Relevant version
1.	<i>Copyright Act 1968 (Cth)</i>	Sections 13, 31 and 36	Compilation No. 54 (registered 22 December 2017)