



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

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

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANTS

Part I: Certification

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

Part II: Outline of Argument

1. Unchallenged factual findings {AS [6]-[28]; ASR [3]-[4]}; DreamDesk was an online system for creating real estate advertising materials offered by DDPL (whose sole director was Mr Meissner). Mr Semmens was a contractor of DDPL. Biggin & Scott (whose directors included Mr Stoner and Ms Bartels) agreed to move Biggin & Scott agencies to DreamDesk. Biggin & Scott had previously used Campaigntrack’s system. {AS [6]-[8]}
2. The detailed and undisputed findings about the appellants’ conduct show serious steps directly opposed to any notion of condoning impropriety; see also {FC [325]-[329]}. Thus:
 - (a) Mr Meissner, who was shocked to discover that Mr Semmens had used a third party software (Process 55) in DreamDesk, took commercial steps to cure that situation, ultimately by selling DreamDesk to Campaigntrack, which had separately bought Process 55 {AS [9]-[10]; see also AS [33]-[35]};
 - (b) Mr Stoner gave Mr Semmens clear and repeated instructions, in writing and orally, against repetition of the same sort of improper conduct, as Mr Stoner and Ms Bartels did not want Mr Semmens to misuse IP belonging to others in developing the new system {AS [11]-[14]; see also AS [29]-[32]}.
3. On 29 September 2016, Campaigntrack’s solicitors sent a letter to Mr Meissner and DDPL asserting “*improper access and duplication of code*” but also stating a willingness to give a 1 week extension of access to DreamDesk if undertakings were given {AS [20]}. On 5-6 October, Mr Meissner accepted the terms of the undertakings; Mr Stoner and Ms Bartels signed them on behalf of Biggin & Scott, RETB and themselves. Mr Stoner was not aware that Mr Semmens had been asked to give an undertaking. Mr Semmens did not sign the undertaking {AS [21]-[22]}.
4. Access to DreamDesk was turned off on 10 October and Toolbox went live that day {AS [23]}. Inspections of Toolbox by an independent expert were agreed and facilitated, and a preliminary report given in January 2017 {AS [24]-[25]}.
5. Campaigntrack’s authorisation case: This became reduced to one of inference based on “*indifference*” said to arise from the letter of 29 September. {AS [53]-[55]}

6. Errors in the Full Court {AS [56]-[64]; ASR [11]-[14]}: The reasons of McElwaine J (Greenwood J agreeing) are dispositive. The critical reasoning is at FC [330]-[339] CAB 268-272; see {AS [37]}.
7. Essential to that reasoning is the proposition that persons may be liable for infringement by authorisation through indifference 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 {AS 56}. This is counter-intuitive: the promise replicated the express stipulations given to Mr Semmens and reflected the trust and expectation he would not do so {AS [57]}.
- 10 8. The letter of 29 September and the giving of undertakings without further or other “*specific inquiries*” cannot transform express disapprobation of, and trust that there would be no, infringement into implicit endorsement of Mr Semmens’ conduct that was later found to constitute infringement and which he sought to conceal {AS [58]; ASR [14]}. The witnesses were not confronted with this in cross-examination. The correspondence was inadequate to the task of establishing authorisation on the unchallenged findings {ASR [14]}.
9. The effect of the majority’s reasoning extends the scope of potential liability by imposing a duty to investigate the possibility of infringement when there was no cue for that to occur. The imposition of such a duty and the consequences of its apparent non-performance resulting in authorisation by “*indifference*” would attach liability in circumstances remote from
20 its core notion {AS [59]-[61]}.
10. The reasons of Cheeseman J (in dissent) show why the primary judge’s conclusion (see {AS [29]-[35]}) should not have been disturbed {AS [62]-[64]}.
11. Copyright Act: By s 36(1), copyright in a literary work is infringed by a person who does or authorises the doing in Australia of “*any act comprised in the copyright*” “*without the licence of the owner of the copyright*”. 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: s 13(1). This includes the exclusive right to authorise a person to do such an act: s 13(2). The exclusive rights in relation to a literary work include the right to reproduce the work in a material form: s 31(1)(a)(i). Infringement by authorisation is a separate statutory tort distinct from primary
30 infringement: *Roadshow v iiNet* (2012) 248 CLR 42. {AS [38]-[40]}
12. Authorisation {AS [38]-[50]; ASR [5]-[8]}: Authorisation means “*sanction, approve, countenance*”: *UNSW v Moorhouse* (1975) 133 CLR 1 at 12, 21. This meaning embodies the central concept that inheres in the statutory text: i.e., 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 {AS [42]}. This statement should be accepted {ASR [6]}. 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].

10 **13.** The “*matters that must be taken into account*” in s 36(1A) in determining whether a person has authorised an act of primary infringement partially codifies the principles at common law. There is nothing in the text or the extrinsic materials to suggest any change in the core notion of authorisation {AS [43]-[45]}.

14. An alleged authoriser must have power to prevent the primary infringements: *Roadshow Films v iiNet Ltd* at [69]. Power to prevent is a direct power to prevent infringements and is not made out by seeking to rely upon an inference arising out of an indirect power to prevent: *Adelaide Corp v APRA* (1928) 48 CLR 481 at 499, 502, 504-505; *Roadshow v iiNet* at [48], [68]-[69], [77]-[78]. {AS 41; ASR [6]}

20 **15.** Aspects of the relationship between an alleged authoriser (B) and the primary infringer (A) will include B’s knowledge of the occurrence or likely occurrence of the acts of the primary infringement and the taking, or failure to take, reasonable steps to prevent those acts that B has power to prevent {AS [46]-[47]}. Knowledge that A might infringe is insufficient: *Nationwide News v CAL* (1996) 65 FCR 399 at 422G. The statutory tort requires actual or constructive knowledge or wilful blindness but does not extend further: *Moorhouse* at 12-13; *Adelaide v APRA* at 487 and *Roadshow v iiNet* at [78], [107]-[110], [138] and [146] {AS [47]}.

16. There is no identifiable species of authorisation characterised by “*indifference*” {AS 48; ASR [7]-[8]}. Indifference may rise to the level of authorisation where the alleged authoriser knows or has reason to suspect that the particular act is or is likely to be done, has the power to prevent it, makes default in some duty of control or interference arising in the circumstances and fails to prevent it: *Adelaide Corp v APRA* at 487, 497, 504-505 {AS [49]}.

Dated: 1 August 2023

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Bret Walker