



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

REPLY

Part I: Certification

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

Part II: Reply

Facts

2. Despite the lengthy recitation in the first respondent's submissions (**RS**) {RS [4]-[37]}, the first respondent does not contest the material facts in the appellants' narrative or chronology. None of the primary judge's findings was challenged by the first respondent.

30 3. Some of the first respondent's narrative by way of characterisation of or commentary upon the facts travels beyond the actual findings. Thus:

(a) {RS [5]} treats the appellants homogeneously; see, also, later in argument {RS [64]-[69], [75], [91]}. This conveys the impression that all appellants were participants in every stage related to Toolbox. This is not correct. DDPL's and Mr Meissner's participation was by providing staff and resources used to develop Toolbox {PJ 305(1) CAB 105}. That must be read with the rest of the finding. The primary judge did not

accept that, having been shocked to discover that Mr Semmens had used Process 55 in the development of DreamDesk and having been effectively forced to sell the intellectual property rights in DreamDesk, Mr Meissner then “*participated in developing a new system, in competition with the purchaser of DreamDesk, in a way which infringed in the intellectual property rights just transferred*” {PJ 305(1) CAB 105; note that FC [273] CAB 252 also omits this finding}. There is no finding that DDPL or Mr Meissner commissioned Toolbox, were participants in any joint venture with Mr Semmens to exploit it or exploited it.

- 10 (b) The emphasis in {RS [8]} on the fact of knowledge of Mr Semmens’ previous conduct fails to mention the primary judge’s findings about what this then meant for the individual appellants. Mr Stoner sought an assurance from Mr Semmens that he would not infringe, trusted him not to infringe and did not want him to misuse intellectual property belonging to others {PJ [42]-[43], [297], [300] CAB 25, 101-103}. Ms Bartels did not want him to misuse intellectual property belonging to others {PJ [44]-[45], [297], [300] CAB 25, 101-103}. The finding for Mr Meissner is above. Further, the quoted sentence in {RS [8]} comes from Greenwood J’s reasons which does not reflect the unchallenged findings.
- 20 (c) {RS [11]} juxtaposes different facts and impermissibly conflates them, including as to timing. While Mr Stoner, Ms Bartels and Mr Meissner were aware that DDPL staff were involved in developing Toolbox {PJ [297(1)], PJ [305(1)] CAB 101, 105}, there was no finding that they knew what Mr Semmens had done; see also {AS [28] and the references there set out}. Further, the finding as to when Mr Meissner was aware that Biggin & Scott was not intending to agree to use the system offered by Campaigntrack was at a later date (between 26 September and 6 October 2016) {PJ [107]-[108], [136] CAB 44, 50}.
- 30 (d) {RS [12]} misstates the findings. Mr Stoner and Ms Bartels knew of the migration scripts for Biggin & Scott data but the primary judge was not satisfied they knew that Mr Semmens had run scripts to copy data of other firms {PJ [67]-[69] CAB 31-32}. The later references do not support the submission at {RS [12]}. The commentary about knowledge of “*unfettered access*” is not located in the findings.
- (e) {RS [16]} does not accurately reflect either the contents of the 29 September 2016 letter (set out at {FC [189] CAB 226-227} or McElwaine J’s reasons which refer, not to the

establishment as true of the asserted fact, but rather to the unambiguous expression of Campaigntrack’s “concern”, an “asserted breach” and a “claim” {FC [290], [330], [332] CAB 257, 268-269}.

(f) {RS [22]} omits the finding based on Mr Stoner’s evidence that he was not aware that Mr Semmens had been asked to give an undertaking {PJ [133] CAB 49; FC [193] CAB 229}.

(g) {RS [28]} ignores the express terms of the findings at {PJ [155]-[156] CAB 55-56}. The primary judge found that Mr Semmens “realised that there was mention of DreamDesk, or some similar description, in the Toolbox system which he wished to conceal” but did not conclude that “he took [these] steps ... on the instruction of any other person” and he accepted Mr Stoner’s evidence that “he did not ask Mr Semmens to change the commit file”.

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4. The chronology of the correspondence from 19 January 2017 to 9 February 2017 is not contested. Three points should be made. *First*, Mills Oakley did not represent DDPL or Mr Meissner at that time; *cf.* {FC [333] CAB 269}. Mr Meissner’s evidence was that the only lawyer he had at that time was the one who helped him with the sale to Campaigntrack {Appellants’ Supplementary Book of Further Materials (ASBFM) at p 4}. *Secondly*, the characterisation of that correspondence by Greenwood J and McElwaine J is contested. *Thirdly*, this later correspondence does not bear upon the issue of authorisation on the majority’s dispositive reasoning.

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Argument

5. Campaigntrack neither confronts, nor disagrees with, the appellants’ statement of principle at {AS [42]} concerning the central concept of authorisation under s 36(1). That statement should be accepted.

6. The submission at {RS [76]} as to the nature of the power to prevent is not supported by authority. A power to prevent is not made out by seeking to rely upon an inference arising out of an indirect power to prevent: *JR Consulting & Drafting Pty Ltd v Cummings* (2016) 329 ALR 625 at [358], referring to *Roadshow v iiNet* at [68]-[69], [77]-[78]. To the extent {RS [77]} suggests liability can be imposed in the absence of requisite knowledge, this corresponds to Campaigntrack’s case below which was rejected and is, in any event, incorrect: see, respectively, {AS [55]} and {AS [47]}.

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7. Campaigntrack’s argument appears to be that “*synonyms or indicia*”¹ are “*useful analytical tools*” {RS [48]-[49]}, that “*sufficient*” but not “*mere*” “*indifference*” is one such indicium {RS 73-74} and, if the factors in subs (1A) are checked off, then authorisation follows. No principled exposition of what “*indifference*” means in this context is advanced.

8. Campaigntrack’s approach departs from principle. It is contrary to this Court’s warnings about the use of synonyms: *Roadshow v iiNet* at [68], [125]; see {AS [42]}. It wrongly sets up “*indifference*” as a species of authorisation inconsistently with *Adelaide v APRA*; see {AS [48]-[49]}. Further, it unmoors the non-exhaustive matters in subs (1A) from the statutory question of asking whether or not a person has authorised the particular act of primary infringement; see 10 {AS [45]-[47]}. The consequence of this approach is the impermissible expansion of liability for authorisation beyond what the statute contemplates.

9. Contrary to {RS [50]}, the appellants’ position in the Full Court was that the primary judge’s trust findings that Mr Semmens would not infringe were an answer to Campaigntrack’s case: ASBFM at pp 5-6. This is consistent with Cheeseman J’s conclusion at {FC [150] CAB 212}, referred to at {AS [62]}; *cf.* {FC [129] CAB 204; FC [336] CAB 271}.

10. The term “*indifference*” was not used by the Full Court as a shorthand for authorisation generally: *cf.* {RS [52]}. It reflected the particular way in which Campaigntrack ultimately had to put its case: see {AS [51]-[55]}.

11. Campaigntrack accepts that the majority’s critical reasoning is at {FC [330]-[339] CAB 268-272}.² Despite this, the summary given in {RS [59]-[65]} does not confront the essential step in that reasoning, identified in {AS [56]}. The submission in {RS [62]} as to the foundation of the majority’s reasoning being based in the failure of Mr Semmens to give an undertaking is not borne out by the whole of {FC [333] CAB 269} when read with {FC [330], [331], [332] CAB 268, 269} which focus on the period from the letter of 29 September to when the undertakings were given, as requested. Further, the attempt in {RS [63]} to recast the observations about the agreement to the independent expert do not accord with the express words “*it was taken at too late a point in time*”. Tellingly, Campaigntrack does not otherwise seek to support this reasoning.

¹ For the avoidance of doubt, the appellants do not accept that the phrases drawn from the cases at {RS [48]} may properly be characterised as “*synonyms*” or “*indicia*”.

² The subsequent two paragraphs {FC [340]-[341] CAB 272} comprise references to authority and conclusory statements that do not bear on the critical reasoning.

12. Instead, and notwithstanding the lack of any notice of contention, Campaigntrack urges this Court to conclude that the appellants are liable for infringement by authorisation on two bases.

13. The first is that the appellants “*went well beyond mere indifference*” {RS [75]}. This submission, together with those at {RS [69] and [91]}, not only wrongly conflates all the appellants but applies the wrong principle (see {AS [41]-[49] and paras 5-8 above).

14. The second involves a reiteration of its arguments on the facts {RS [76]-[90]}. This lengthy passage fails to grapple with the fundamental issue. Neither the majority in the Full Court nor Campaigntrack explains how the letter of 29 September 2016 and the giving of the undertakings without further inquiry transforms any of the appellants’ express disapprobation of, and trust that there would be no, infringement into implicit endorsement of Mr Semmens’ conduct later found to constitute infringement and which he sought to conceal. In the absence of confronting the witnesses with this in cross-examination,³ the correspondence was inadequate to the task of establishing that any of the appellants authorised the acts of primary infringement on the unchallenged findings at trial. The primary judge’s conclusions should not have been overturned.

Citation

15. The reasons of the Full Court are now reported as *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512.

20 **Dated:** 30 May 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

³ Campaigntrack does not dispute that there was no such cross-examination: see {RS [57]} (“*as established by documentary evidence*”).