

Application of the 'Tendency Rule' in civil proceedings

Justin Simpkins reports on *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* [2013] HCA 21; 297 ALR 406

In *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* the High Court refused special leave to appeal in a case concerning the primary judge's use of tendency evidence to establish copyright infringement where the tendency rule was not complied with.

Tendency evidence

Tendency evidence is evidence that is tendered to prove (by inference), that because, on a particular occasion or occasions, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceeding, acted in a particular way (or had a particular state of mind).¹

The 'tendency rule', which is set out in section 97 of the *Evidence Act 1995* (Cth), provides, *inter alia*, that evidence of the character, reputation or conduct of a person, or tendency, is inadmissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind, unless reasonable notice has been given of the intention to adduce the evidence² and the evidence, either by itself or having regard to other evidence to be adduced, has 'significant probative value'.

Background

The applicants manufactured and sold electronic gaming machines and software. The respondents were in the business of selling second-hand gaming machines. The applicants commenced proceedings against the respondents in the Federal Court alleging copyright infringement.³ The essence of the applicants' case was that the respondents participated in a joint venture to counterfeit and sell second-hand gaming machines assembled using pirated copies of materials in which the applicants held copyright.⁴

The applicants' case was primarily based on circumstantial evidence.⁵ At trial, the applicants tendered, over objection, a number of email chains said by them to constitute 'instances of unguarded communications that make plain the true nature of the joint venture's trade (a counterfeiting operation)'.⁶ The emails did not relate to the alleged infringing transactions.

The primary judge held that the respondents had infringed the applicants' copyright.

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The Full Federal Court

On appeal, the Full Federal Court (Bennett, Middleton and Yates JJ) found that the trial judge used the email correspondence as an essential part of his reasoning process leading to his findings of infringement.⁷ The Full Federal Court found that the only way the primary judge could have made the necessary connection between the infringing transactions and the joint venture was to draw an inference, based on the content of the emails, that the respondents had a tendency to engage in infringing conduct⁸.

The Full Federal Court noted that Part 3.6 of the *Evidence Act 1995*, of which s 97 forms part, contains a number of safeguards to limit the potential misuse of tendency evidence.⁹ Those safeguards include the requirement under s 97(1)(a) to give reasonable notice and that the evidence has significant probative value. The applicants at trial had not given notice because they did not seek to use the emails as evidence that the respondents had a tendency to engage in infringing conduct.¹⁰ As the requirements of s 97 had not been complied with, the evidence was not admissible for a tendency purpose, and as a result the connection between the emails and the infringing transactions could not be maintained.

The High Court

The applicants sought special leave to appeal the Full Federal Court's decision, as to the question of whether the full court erred in characterising the primary judge's reasoning about evidence of the emails as inferring a tendency on the part of the respondents to engage in infringing conduct. The High Court (French CJ; Crennan, Kiefel, Gageler and Keane JJ), in refusing special leave, held that the full court's characterisation of the primary judge's reasoning was open to it and was not attended with sufficient doubt to warrant the grant of special leave, and handed down reasons for that judgment.¹¹ The court also held that the application did not involve a

question of law of public importance. The applicants had not argued that it did, but that the interests of justice required consideration by the High Court of the full court's judgment, which argument was rejected.¹²

The High Court found the email evidence had been properly admitted as relevant to credit and the existence of the joint venture. The issue was the use of the email evidence by the primary judge, albeit *sub silentio*, to infer a tendency to act in a particular way that was central to the reasoning of the full court.¹³

In response to the applicants' submission that the full court characterised the primary judge's use of the email evidence incorrectly, on the basis that there was nothing in the primary judge's reasons which indicated that he had used the emails as tendency evidence, the High Court held that the primary judge used the email evidence in such a way as to justify the full court's view of his reasoning process.¹⁴

Endnotes

1. *R v Cittadini* [2008] NSWCCA 256; 189 A Crim R 492 at [23].
2. Section 97(1)(a), the court may dispense with the notice requirement (s 100).
3. *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd* [2009] FCA 1495; (2009) 84 IPR 222.
4. *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* [2013] HCA 2; 297 ALR 406 at [7].
5. *Allam v Aristocrat Technologies Australia Pty Ltd* [2012] FCAFC 34; (2012) 95 IPR 242 at [240].
6. *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* [2013] HCA 2; 297 ALR 406 at [12].
7. At [241].
8. At [241] see also *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplied Pty Ltd & Allam* [2013] HCA 2; 297 ALR 406 at [28].
9. At [242].
10. At [242] and [243].
11. At [2].
12. At [36].
13. At [33].
14. At [35].