

FEDERAL COURT OF AUSTRALIA

Dallas Buyers Club LLC v iiNet Limited (No 4) [2015] FCA 838

Citation: Dallas Buyers Club LLC v iiNet Limited (No 4) [2015] FCA 838

Parties: **DALLAS BUYERS CLUB LLC and VOLTAGE PICTURES LLC v IINET LIMITED, INTERNODE PTY LTD, AMNET BROADBAND PTY LTD, DODO SERVICES PTY LTD, ADAM INTERNET PTY LTD and WIDEBAND NETWORKS PTY LTD**

File number: NSD 1051 of 2014

Judge: **PERRAM J**

Date of judgment: 14 August 2015

Catchwords: **DISCOVERY** – application for preliminary discovery – manner in which such applications should be conducted – whether what is being pursued is a genuine right to obtain relief – nature of demands to be put to prospective respondents

COPYRIGHT – actions for infringement – operation of s 115 of the *Copyright Act 1968* (Cth) – whether open to assess damages of copyright owner on basis of foregone licence fee in circumstances – whether s 115(4) permits regard to infringements of another’s copyright – whether s 115(6) enlivened

PRACTICE AND PROCEDURE – securing undertaking of party without domestic presence – amount and nature of bond

Legislation: *Copyright Act 1968* (Cth) s 115
Federal Court of Australia Act 1976 (Cth) s 31A(2)
Federal Court Rules 2011 (Cth) r 7.22

Cases cited: *Autodesk Australia Pty Ltd v Cheung* (1990) 94 ALR 472 considered
Dallas Buyers Club LLC v iiNet Limited [2015] FCA 317 cited
Dallas Buyers Club LLC v iiNet Limited (No 3) [2015] FCA 422 cited
Golden Eye (International) Ltd v Telefonica UK Ltd [2012] EWHC 723 (Ch) cited
Halal Certification Authority Pty Ltd v Scadilone Pty Ltd

(2014) 107 IPR 23 considered
Voltage Pictures LLC v John Doe [2014] FC 161 cited

Explanatory Memorandum to the *Copyright Amendment
Bill 2006* (Cth)

Date of hearing:	18 June 2015
Dates of further written submissions:	2, 15, 29, 31 July 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	38
Counsel for the Prospective Applicants:	Mr I Pike SC
Solicitor for the Prospective Applicants:	Marque Lawyers
Counsel for the Respondents:	Mr RPL Lancaster SC and Mr C Burgess
Solicitor for the Respondents:	Thomson Geer Lawyers

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1051 of 2014

BETWEEN: **DALLAS BUYERS CLUB LLC**
 First Prospective Applicant

VOLTAGE PICTURES LLC
 Second Prospective Applicant

AND: **IINET LIMITED**
 First Respondent

INTERNODE PTY LTD
 Second Respondent

AMNET BROADBAND PTY LTD
 Third Respondent

DODO SERVICES PTY LTD
 Fourth Respondent

ADAM INTERNET PTY LTD
 Fifth Respondent

WIDEBAND NETWORKS PTY LTD
 Sixth Respondent

JUDGE: **PERRAM J**

DATE OF ORDER: **14 AUGUST 2015**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The Prospective Applicants' application to lift the stay of Order 1 made on 6 May 2015 be dismissed.
2. The Prospective Applicants pay the Respondents' costs of that application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
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NSD 1051 of 2014

BETWEEN: **DALLAS BUYERS CLUB LLC**
 First Prospective Applicant

VOLTAGE PICTURES LLC
 Second Prospective Applicant

AND: **IINET LIMITED**
 First Respondent

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 Second Respondent

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 Fourth Respondent

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 Fifth Respondent

WIDEBAND NETWORKS PTY LTD
 Sixth Respondent

JUDGE: **PERRAM J**

DATE: **14 AUGUST 2015**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1. Introduction

- 1 In *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317 (*‘DBC v iiNet’*) this Court concluded that, in principle, the respondent ISPs were obliged to provide the prospective applicants (together ‘DBC’) with account holder details by way of preliminary discovery. Following further argument on procedural issues, orders giving effect to that conclusion were made on 6 May 2015: *Dallas Buyers Club LLC v iiNet Limited (No 3)* [2015] FCA 422. The preliminary discovery order itself (Order 1) was, however, stayed pending DBC providing to

this Court a copy of the correspondence it was proposing to engage in with the account holders: Order 5 and [13]. The purpose of the stay and the Court's consideration of the correspondence was to ensure that DBC did not engage in what the respondent ISPs referred to as 'speculative invoicing'.

2 DBC has now sought to lift the stay and has proffered to the Court several versions of what it proposes to say to the account holders, together with an undertaking only to communicate in those terms.

3 I have concluded that what DBC proposes ought not be permitted.

2. The Discretion

4 Whilst DBC has satisfied the jurisdictional prerequisites to the power in r 7.22 of the *Federal Court Rules 2011* (Cth) being enlivened by showing that (a) it might have a right to sue the account holders (or others) for copyright infringement and (b) that the respondent ISPs can assist in identifying the account holders, that power nevertheless remains a discretionary one. Subject to the question of the terms of the correspondence, I determined in *DBC v iiNet* that the discretion should be exercised in DBC's favour.

5 The exercise of the discretion is moulded by the scope, purpose and ambit of the rule itself. The centrepiece of the rule is the idea that what a prospective applicant for preliminary discovery is ultimately seeking to vindicate is *a right to obtain relief* against an unidentified person. This focus on a right to obtain relief emerges from the use of those words in r 7.22(1)(a), whilst the discretionary nature of the power derives from the use of the word 'may' (rather than 'must') in r 7.22(2). It is convenient to set out the text of the rule in full:

'7.22 Order for discovery to ascertain description of respondent

- (1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant satisfies the Court that:
 - (a) there may be *a right* for the prospective applicant *to obtain relief* against a prospective respondent; and
 - (b) the prospective applicant is unable to ascertain the description of the prospective respondent; and
 - (c) another person (the other person):
 - (i) knows or is likely to know the prospective respondent's description; or
 - (ii) has, or is likely to have, or has had, or is likely to have had, control of a document that would help ascertain the prospective respondent's description.

- (2) If the Court is satisfied of the matters mentioned in subrule (1), the Court *may* order the other person:
- (a) to attend before the Court to be examined orally only about the prospective respondent's description; and
 - (b) to produce to the Court at that examination any document or thing in the person's control relating to the prospective respondent's description; and
 - (c) to give discovery to the prospective applicant of all documents that are or have been in the person's control relating to the prospective respondent's description.

Note 1: Control and description are defined in the Dictionary.

Note 2: For how discovery is to be made, see rule 7.25.

- (3) The prospective applicant must provide the person with sufficient conduct money to permit the person to travel to the Court.

Note: Conduct money is defined in the Dictionary.'

[My emphasis]

6 In *DBC v iiNet* my precise conclusion was that DBC might well have a right to sue for copyright infringement under s 115(1) of the *Copyright Act 1968* (Cth) persons who had been sharing *Dallas Buyers Club* ('the Film') over the BitTorrent network. The requirements of subr (1) literally were met. However, in considering whether the discretion in subr (2) should be exercised, it is relevant to consider whether DBC has any right to obtain the sums of money that it now proposes to demand from infringers (accepting, of course, that not all account holders will necessarily be infringers). To give an extreme example to underscore the point: whilst it is obvious that people using BitTorrent to copy the Film without DBC's permission are breaching its copyright (so that subr (1) is satisfied), the Court would not give access to the information (under subr (2)) if DBC proposed to use it so that stones might be thrown at the infringers' windows. This is because the breaking of windows has nothing to do with the exercise of a right to obtain relief within the meaning of r 7.22(1).

7 It is true that English and Canadian authorities have exercised a power to superintend the correspondence that parties in the position of DBC have proposed to send: cf. *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch); *Voltage Pictures LLC v John Doe* [2014] FC 161. Those decisions suggest that those Courts will exercise a supervisory role, almost akin to that of a consumer protection authority, in scrutinising proposed correspondence with account holders. This reasoning flows from the fact that in

both the United Kingdom and Canada there are human rights instruments which guarantee privacy, the application of which requires the Courts in those countries to engage in a proportionality analysis foreign to Australian law.

8 I do not accept that this Court has such a role beyond the role indicated at [86] in *DBC v iiNet*. However, I do accept that the Court needs to be satisfied when it exercises the discretion under r 7.22(2) (by allowing the application or, as here, by lifting an earlier stay) that what a prospective applicant is proposing to do with the information thereby garnered accords with a purpose contemplated by r 7.22. In cases such as the present, that inquiry will devolve into an examination of whether the individual monetary demands which are proposed to be made could plausibly be sued for. If they could not, then it would not be a proper exercise of the discretion to permit release of the account holders' information.

3. The Demands

9 What demands does DBC make? It would be fair to say that DBC has not rushed to make its position clear. At the first hearing, it did not precisely disclose what it was going to do with the information once it obtained it. One of DBC's executives, Mr Wickstrom, was cross-examined and it was put to him that DBC was a speculative invoicer. As I said in *DBC v iiNet* at [81], the evidence satisfied me that DBC, in this country, would be as aggressive in its correspondence with account holders as it could be whilst remaining within the law. That still left wholly unanswered, however, what it was actually going to do.

10 The next round in the proceedings saw this Court make orders on 6 May 2015 which indicated that whilst satisfied, in principle, that DBC was entitled to preliminary discovery, the Court was not going to open the sluice gates until it saw the proposed correspondence and until DBC satisfied the Court that it was that approved correspondence, and not something else, such as a dead cat, that DBC was going to send to account holders.

11 This brought forth the first draft letter. There is no need to set it out. It was quite long and, on the whole, negative about people copying the Film, which is hardly surprising. Critically, however, it did not make any demand for a sum of money. Instead, it encouraged recipients to make a telephone call to discuss the matter or to engage in email correspondence with an unidentified representative of DBC.

12 In response to this manoeuvre, it was suggested in correspondence between the parties and my chambers that I would need to see the scripts of what was to be discussed. These were

forthcoming in due course but they, too, omitted any reference to the amounts of money which were to be demanded.

13 There was then a hearing on 18 June 2015, during which I indicated that I was not going to approve anything unless I was shown what it was that DBC was proposing to demand monetarily or, as I put it at the time, the methodology underlying its approach to the amounts it was going to claim.

14 A written submission was then prepared by DBC which set out in some detail what DBC was going to demand as a matter of money. At DBC's instigation I made a confidentiality order in relation to that submission (which was lodged on 2 July 2015) because it disclosed DBC's bottom-line negotiating position which would destroy, or at least seriously impact upon, its ability to negotiate. Access was, however, granted to the respondent ISPs' lawyers. They in turn put on a submission on 15 July 2015 in which they submitted that what DBC was now proposing was plainly 'speculative invoicing'. Further submissions were then received at the Court's invitation on the operation of s 115(5)-(8), with the last of these being received on 31 July 2015.

15 I will not publish the actual figures that DBC proposes to demand for the confidentiality reasons I have just mentioned. But I will indicate that they consist of four heads:

- (a) a claim for the cost of an actual purchase of a single copy of the Film for each copy of the Film downloaded. This is quite a bit more than the cost of renting a copy of the Film on a 48 hour basis from a platform such as iTunes. Here DBC's argument is quite clear: the copy that has ended up on the infringers' hard drives is not a 48 hour rental copy but a permanent one;
- (b) a claim for an amount relating to each infringers' uploading activities. Here DBC suggested that the number of uploads was potentially very large given the way BitTorrent operates, with each user sharing the Film with other users by means of transfers of slivers across the network. DBC submitted that it was entitled to obtain a one-off licence fee from each uploader on the basis that each was engaged in the widespread distribution of the film. It is not trespassing on DBC's legitimate confidentiality concerns to say that the sum sought by DBC in relation to this head of damages was substantial;

- (c) a claim for additional damages under s 115(4) (i.e. punitive damages) depending on how many copies of *other* copyrighted works had been downloaded by each infringer; and
- (d) a claim for damages arising from the amount of money it has cost DBC to obtain each infringer's name.

4. Permissible Demands

- 16 Despite the protestations of the respondent ISPs, I do not see any real difficulties with the sums claimed in (a) and (d). Certainly, there may be debates to be had in the future about them but, for the present, both claims are plausible on their face.
- 17 As to (a), maybe ultimately the rental price will turn out to be what most infringers would have paid if they had not downloaded the Film using BitTorrent. Maybe the evidence will ultimately show that some of the infringers were true pirates and, sailing under the Jolly Roger, would only ever have acquired a copy of the Film if they did not have to pay for it. Maybe some regard will eventually need to be taken of the difference between the prices charged by retail outlets and the size of the revenue streams flowing to DBC. But even taking account of all of those future possibilities, the idea that DBC's damages should equal the value of what was taken from it without its permission is not, self-evidently, a ridiculous claim and, indeed, has a certain biblical charm. Significantly, if such a demand were made in actual proceedings I do not think that those proceedings would be summarily dismissed without a trial on the basis that they were hopeless.
- 18 So too with (d). DBC has spent a lot of money on the technological exercise involved in identifying the IP addresses using Maverick Monitor and then quite a bit more in these proceedings on Mr Pike SC and his instructing solicitors. Whilst the ISPs have been ordered to bear a good portion of those costs, DBC is nevertheless still going to be left out of pocket because the cost order was limited to 75% and because the costs indemnity, in any event, is never full. That shortfall, which is an actual expense in its books, would never have been suffered by DBC but for the infringing activity and it seems to me to be squarely within the kind of consequential loss which can be recovered on ordinary principles. Although this sum is likely to be quite large in absolute terms it becomes much less significant when distributed over a large number of infringers.

19 If matters had rested there I would have given DBC access to the account holder information by lifting the stay. However, I do not think that claims (b) and (c) are within the purposes for which the power in r 7.22 can be used.

5. Impermissible Demands

20 For the reasons given in *DBC v iiNet*, there is no doubt that by sharing the Film online over BitTorrent each person doing so infringed DBC's copyright. Further, it seems to me that each act of sharing with a different user probably constituted a separate act of infringement. This has the consequence that the way BitTorrent interacts with s 115 is likely to mean that very many more infringements may occur than ultimately copies are made. To take a wholly unrealistic but usefully illustrative example, if 2 people each with an original version of the Film (i.e. ones which were not obtained using BitTorrent) both share it with one other person over the BitTorrent network, the recipients both infringe once each by downloading and the uploaders also infringe once each by sharing. The result is two copies and four infringements. If one person with an original version shares with 1,000 people there are at least 2,000 infringements. In practice, because what is shared are slivers of films rather than whole films the result is likely to be that an astronomical number of infringements occur. Ultimately, it is safe, I think, to assume that any Court looking at this process is likely to focus in relation to damages on what comes out at the end (i.e. whole copies of films) rather than on the numerical impact of the slivers shared over the network.

21 But those issues are not the problem which arises here. That problem is DBC's claim to an entitlement to damages which correspond to the licence fee each uploader would need to have paid DBC in order for it to have authorised their sharing of the Film via BitTorrent. But that debate arises from the counterfactual inquiry that the calculation of damages often throws up. Here the Court would seek to put DBC back in the position it would have been in if the infringements had never occurred. But there are many different ways in which the infringements might not have occurred. One counterfactual is that the infringer might not have used BitTorrent at all but instead rented the Film legitimately from another source. Another is that the infringer might have foregone watching the Film altogether. Yet another is that the infringer might have seen the Film at the cinema. DBC's particular version of the counterfactual is that the infringer would still have shared the Film over BitTorrent but would have sought DBC's permission to do so first and paid the appropriate licence fee that DBC

would then have demanded. All of these differing scenarios are theoretically available ways of calculating DBC's damages.

- 22 Which of them is to be chosen is a question of fact. And this remains true when it is alleged that the foregone licence fee approach is to be applied. In *Autodesk Australia Pty Ltd v Cheung* (1990) 94 ALR 472 Wilcox J declined to award damages on this basis because the evidence did not support the idea in that case that the infringer would have sought the suggested licence to avoid the infringement. In *Halal Certification Authority Pty Ltd v Scadilone Pty Ltd* (2014) 107 IPR 23, admittedly a trade mark case, the Court declined to award damages on a foregone licence basis because it was satisfied that the relevant infringer, if it had not forged the applicant's halal certificate to certify the kebabs it supplied to various kebab shops as halal, would have forged someone else's in order to do the same thing. The licence counterfactual was inapplicable because the infringer would never have sought a licence from the applicants at all.
- 23 In this case, the idea that any court would assess DBC's damages on the basis that BitTorrent users who were going to share the Film over the BitTorrent network would have avoided infringement by approaching DBC to negotiate a distribution arrangement in return for a licence fee is so surreal as not to be taken seriously. If such a claim were made in a proceeding for copyright infringement in this Court I am satisfied that it would be dismissed summarily without trial under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) as a case having no reasonable prospects of success.
- 24 In relation to the foreshadowed claims for additional (or punitive) damages under s 115(4) a similar problem arises. DBC seeks to have those damages assessed by reference to how many copies of *other* films each infringer downloaded using BitTorrent. The more that the downloader had downloaded the higher the additional damages would rise. The text of s 115(4) is:

'115 Actions for infringement

...

- (4) Where, in an action under this section:
- (a) an infringement of copyright is established; and
 - (b) the court is satisfied that it is proper to do so, having regard to:
 - (i) the flagrancy of the infringement; and
 - (ia) the need to deter similar infringements of copyright; and

- (ib) the conduct of the defendant after the act constituting the infringement or, if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff's copyright; and
- (ii) whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form; and
- (iii) any benefit shown to have accrued to the defendant by reason of the infringement; and
- (iv) all other relevant matters;

the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.'

25 The wording of this section is inconsistent with it being used to calculate damages on the basis of infringements other than the one the downloader is being sued for. It does not permit recourse to other acts of infringement of other people's copyright. Such a claim would be summarily dismissed.

26 After the provision by DBC of its proposed methodology, the Court raised with the parties on 22 July 2015 the impact of ss 115(5)-(8). These subsections provide:

'115 Actions for infringement

...

Consideration for relief for electronic commercial infringement

- (5) Subsection (6) applies to a court hearing an action for infringement of copyright if the court is satisfied that:
 - (a) the infringement (the ***proved infringement***) occurred (whether as a result of the doing of an act comprised in the copyright, the authorising of the doing of such an act or the doing of another act); and
 - (b) the proved infringement involved a communication of a work or other subject-matter to the public; and
 - (c) because the work or other subject-matter was communicated to the public, it is likely that there were other infringements (the ***likely infringements***) of the copyright by the defendant that the plaintiff did not prove in the action; and
 - (d) taken together, the proved infringement and likely infringements were on a commercial scale.
- (6) The court may have regard to the likelihood of the likely infringements (as well as the proved infringement) in deciding what relief to grant in the action.
- (7) In determining for the purposes of paragraph (5)(d) whether, taken together,

the proved infringement and the likely infringements were on a commercial scale, the following matters are to be taken into account:

- (a) the volume and value of any articles that:
 - (i) are infringing copies that constitute the proved infringement; or
 - (ii) assuming the likely infringements actually occurred, would be infringing copies constituting those infringements;
 - (b) any other relevant matter.
- (8) In subsection (7):
article includes a reproduction or copy of a work or other subject-matter, being a reproduction or copy in electronic form.'

27 Written submissions were received from both parties with that process ending on 31 July 2015.

28 The explanatory memorandum which accompanied this amendment plainly suggests that it was intended to be directed at file sharing. The relevant portion of that memorandum reads:

- ‘4.3 In order to deal with issues that have arisen in cases involving large numbers of likely infringements over the Internet, new subs-ss 115(5)-(8) give a court additional power to grant relief in civil actions to copyright owners in certain commercial scale Internet infringement cases. This applies where the court is satisfied that:
- the respondent has committed an infringement (including by authorisation),
 - it involved a communication of a work or other subject-matter to the public,
 - because of this communication, it is likely there were other infringements of the copyright by the defendant that the plaintiff did not prove, and
 - taken together, the proved infringement and the likely infringements occurred on a commercial scale.
- 4.4 Where a court is satisfied of these matters, it may have regard to the high probability of the likely infringements (as well as the proved infringements) in deciding what relief to grant in the action.
- 4.5 New paragraph 115(5)(c) is intended to be wide enough to capture commercial-scale Internet infringements that occur through peer-to-peer file sharing or by way of hypertext linking or downloads from remote websites. This is consistent with the definition of ‘communicate’ in sub-s 10(1) which includes ‘to make available online or electronically transmit’.
- 4.6 Pursuant to new paragraph 115(5)(d) the proved and likely infringements, taken together, must be on a ‘commercial scale’ before the court can have regard to such infringements in deciding what relief to grant. This is a safeguard to ensure that a plaintiff could not apply for this relief on the basis of an insufficient number of infringements.
- 4.7 Subsection (6) provides that the court may have regard to the high probability

of the likely infringements (as well as the proved infringements) in deciding what relief to grant. It is the intention of the Bill that the determination of 'commercial scale' not be limited to proven infringements only. There are cases where it is appropriate to point to likely infringements to enable a plaintiff to meet the 'commercial scale' threshold. The plaintiff is required to establish, at least, that an infringement has occurred (see new paragraph 115(5)(a)). Once this is established, the court may have regard to likely infringements in the determination of scale.

- 4.8 New subs-s 115(7) provides for the matters that the Court may consider in determining if the infringement has occurred 'on a commercial scale' for the purposes of new paragraph 115(5)(d). This includes the volume and value of articles that are infringing copies constituting the proved infringements or infringing copies constituting the likely infringements assuming they actually occurred.'

- 29 If the explanatory memorandum is to be believed, ss 115(5)-(8) are aimed squarely at peer-to-peer file sharing. There are aspects of the provisions which are puzzling from a drafting perspective. The use of the expression 'on a commercial scale' is not defined although subs (7) tells one what one is to take into account in determining whether a particular infringement was on such a scale. This appears to be focussed on the possibility that whilst one might be able to show that a particular user shared three copies of a work by uploading it, one might not be able to show much about what those three individual downloaders went on to do by way of sharing themselves.
- 30 The focus of the provisions in subs (7) is on the reproduction of articles, an expression which is defined to be a copy of the work or other subject-matter in subs (8). The provisions appear, therefore, to have been drafted upon an assumption, which the evidence before me did not support, that individual users share whole copies, whereas in fact they share slivers. In that regard, the calculus thrown up by s 115(7)(a)(i) seems to be particularly problematic and bespeaks, seemingly, a lack of understanding of the mechanics of peer-to-peer file sharing.
- 31 There are many uncertainties about these provisions but I do not think that they presently need to be resolved. The parties had differing views about whether the requirements of s 115(5)(c)-(d) could properly be seen as having been satisfied in this case.
- 32 The matter can, I think, be resolved without becoming mired in that swamp. The present application is concerned with what DBC can, or cannot, demand of potential infringers. Assuming in their favour that these provisions are enlivened the question then becomes what do they want? In particular, what are they going to demand of account holders? DBC has made no submission to me about how these damages might be calculated or what they will

seek, beyond asserting that these provisions lend further support to the reasonableness of the figures sought in their proposed methodology. For example, it may be that these provisions would justify the conclusion that the Film was copied many thousands of times using BitTorrent and that infringers are to be held liable for further downstream infringements. I have no particular problem with such an analysis but DBC still has to explain what it is going to demand of the people it writes to. Nothing has been submitted to me on that topic. In those circumstances s 115(5)-(8) presently goes nowhere.

6. Conclusions

33 The power in r 7.22 of the *Federal Court Rules 2011* (Cth) can be used, I accept, to garner information about unidentified wrongdoers not only to sue them but also to negotiate with them. However, in both cases the power does not extend to facilitating court cases or negotiating positions lacking legal substance. Claims (b) and (c) are untenable claims and are outside the proper ambit of the power.

34 In those circumstances, I decline to lift the stay at this stage. I will, however, lift the stay if the Court receives DBC's written undertaking only to use the information obtained under the preliminary discovery orders for the purposes described above in (a) and (d).

35 Because DBC has no presence in Australia the Court is unable to punish it for contempt if it fails to honour that undertaking. I will therefore require its undertaking to be secured by the lodging of a bond. Having had access to what it is that DBC proposes to demand under (b) and (c) and the potential revenue it might make if it breached its undertaking to the Court not to demand such sums, it seems to me that I should set the bond at a level which will ensure that it will not be profitable for it to do so. I will set the bond at \$600,000 which, if the undertaking is given, is to be lodged by bank guarantee with the Registrar.

36 For the future, in cases where preliminary discovery is sought against persons such as ISPs with a view to contacting a large class of potential defendants, it will be an essential step in that process that the prospective applicant discharge at the hearing of the application the burden of proving that it seeks preliminary discovery for a purpose countenanced by r 7.22 and, in particular, that it put on evidence of the nature of the demands or claims it proposes to make. Whilst the UK and Canadian cases explain why two hearings occurred in this case, there is no real reason for this to occur in the future. Further, I do not think it is appropriate for the Court to examine the content of any correspondence, other than to discern whether the prospective applicant's purpose is within r 7.22. Ordinarily it will be useful to grant the

preliminary discovery on the basis of an undertaking only to use the information for the purposes specified and, where the prospective applicant is absent from the jurisdiction, to require security for that undertaking.

37 Finally, as in *Voltage v John Doe*, I think it appropriate if this matter goes further that DBC should also undertake that any proceedings it commences should be commenced in this Court rather than in the Federal Circuit Court. And, at least in the first instance, if the undertaking is forthcoming I will direct the Registrar that any such case which is filed should be listed before me for directions. In particular, any multi-respondent or reverse class action suit should come before me for directions before it is served on any respondent.

38 The present application will be dismissed with costs.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

A handwritten signature in blue ink, appearing to read 'T. Bayl', is written over a light blue rectangular background.

Dated: 14 August 2015