

Back to School Over Ownership of Faculty Invented Software

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Introduction

The recent case of *Victorian University of Technology v Wilson*¹ provides instructive analysis of the legal issues that arise in disputes over intellectual property (IP) rights between a faculty inventor of valuable software and the inventor's employer university. The IP rights of employers in software produced by an employee in the scope of their employment had been confirmed in previous cases,² but the university context poses unique problems which had never before been tested in court in Australia.³ The idiosyncratic employment nature of academics made it a challenge for the Court to determine what actually is 'in the scope' of their employ. The reasoning provided in this case is therefore important to all parties trying to invent, protect or market the large amounts of commercially exploitable computer products which result from research in the university sector.⁴

The Parties

The Plaintiff in this case was the Victoria University of Technology (**VUT or the University**).⁵ It brought action against six defendants:

- Professor Wilson, the VUT Head of Applied Economics (**Wilson**);
- Dr Feaver, (**Feaver**) the VUT Head of its Centre for International Business Research and Education (**CIBRE**);⁶
- Craig Astill, a former VUT student (**Astill**); and
- the corporate entities in which the first three defendants had an interest.⁷

The Facts

World Trade On-Line Holdings Ltd (**WTO**) was trying to develop a software and internet platform that

could connect companies around the world for trade purposes. The company had raised venture funding and had interest from companies like IBM.⁸ WTO wanted Wilson and Feaver, two academics recognised as experts in international economics, to develop an on-line training course in international trade that would accompany the software (**On-line Course**). This On-line Course was a key component of the whole concept as it gave participants accreditation in international trade. WTO considered that if such a course was developed and run by the University, it would make the whole trading software package especially attractive. Wilson and Feaver were eager to be involved and in their meetings with WTO through August 1999 agreed to help develop the scheme.⁹ Around this time the third defendant, Astill, became involved in WTO. Through his acquaintance with one of the WTO directors he was introduced to the concept and invested \$75,000 of his own money in WTO. He was given responsibility by WTO for supervising the On-line Course being developed by Feaver and Astill.¹⁰

By September 1999, Wilson, Feaver and Astill became concerned that WTO had no idea how to create the schematics of the trading software and that they might lose funding from IBM to provide the course content. At a meeting on 15 September 1999 the academics resolved that, despite their lack of experience with computers, they would attempt to create the trading software themselves, not just the On-line Course component. They agreed to share the IP in the software among themselves, 40% to each of the two academics and 20% to Astill.¹¹

By reading reference books on business process mapping, schematic engineering and software architecture during the evening and on weekends, Feaver found that he was able to develop the skills required to design the trading software.¹² Throughout

September 1999, he determined the major functions, parameters and data sequences needed for the software. Astill assisted by developing the financial and logistical processes. Wilson's role was to check the concepts and variables and make suggestions for improvement. By the end of September 1999, they had produced test software, which they were satisfied could demonstrate the concept. The three men signed a memorandum of understanding in which they agreed to incorporate a new company, IP3 Pty Ltd (**IP3**), which would own the IP in the software. IP3 would license it on a non-exclusive basis to WTO. The shares of IP3 were divided between them as per the original agreement, 40% to Wilson, 40% to Feaver and 20% to Astill.¹³ In the last week of September 1999, the trading software was presented to IBM in Malaysia bearing the names of the three as owners of the copyright, as well as bearing the logos of VUT and CIBRE.¹⁴

During October 1999, Feaver made a significant change from the original concept of the WTO. He developed the system so it was not static trading software but instead an e-commerce 'transaction hub' with direct business-to-business connectivity (**E-Commerce System**).¹⁵ The E-Commerce System was much more complex than the original trading software and required significant amounts of further work on the mechanics of transaction data convergence. Fortunately, Wilson was able to solve the problems of this new system with his expertise in preference theory economics. The details were finished by November 1999 and a web-site designer was commissioned to create a workable prototype. It was around this time that WTO pulled out of its plan altogether. However, IP3 continued with the trading software and this new E-Commerce System architecture.

On 16 March 2000, a provisional patent specification was lodged in the name of IP3 entitled "E-Commerce Facilitation".¹⁶ Soon after, IP3 was able to secure a partnered project alliance with Price Waterhouse Coopers (**PwC**). PwC saw the potential in the patent and provided the technical assistance and considerable resources necessary to develop the system in return for an issue of shares in IP3.¹⁷ PwC then further consolidated their holding in IP3 by buying a larger share from Wilson and Feaver for close to a million dollars.¹⁸ A team of PwC programmers developed the beta version of the E-Commerce System over the following 12 months. During this time, Feaver acted as the system architect and devoted significant amounts of time to the project. As a consequence, for 2001 he contracted with VUT to work part-time only. Wilson was also significantly involved and used his overseas study leave and long service leave to work at IP3. He also used his position as Head of School to borrow two high-powered computer servers from the University for use at IP3.¹⁹

On 16 March 2001, a complete patent specification was filed²⁰ and IP3 began to promote its E-Commerce System through its detailed website,²¹ especially its two products registered under the trade marked monikers 'Electron'²² and 'Ether'.²³ In late 2002, another VUT faculty member who came upon the website, recognised the references to the work done by Feaver and Wilson and notified the University. After its initial investigation VUT commenced proceedings in the Supreme Court of Victoria.²⁴

The Plaintiff's case

The University alleged in its pleadings a range of actions from breach of contract to breach of fiduciary duty in numerous combinations.²⁵ In brief, there were two main contentions:

1. the defendants were in breach of their employment contract which included the University Intellectual Property Policy (**IP Policy**) that all patents and copyright created in the course of employment or created with substantial funding, contribution

or resources and facilities would be owned by the University and as a result, the defendants were required to account to the University for the IP in the trading software and E-Commerce System; and

2. the defendants were in breach of an implied contractual term not to enrich themselves by diverting the opportunity to develop the valuable software and system from the University to IP3 and thus they were liable to compensate VUT for the loss of the opportunity. Or, in another way, the defendants owed VUT a fiduciary duty not to take personal advantage of an opportunity which they learned of by virtue of their position in the University. As a result, the defendants held their interest on trust for the University.

The Defendant's Case

Wilson, Feaver and Astill countered with four main assertions:

1. no IP Policy was brought to their attention during their employment at the University and the IP Policy was not in fact part of their employment contracts;
2. the invention was not made during their employment hours and was in an area different to the study, scholarship and research they would be expected to pursue in their position. Further, the University did not contribute substantially with facilities, resources or apparatus;
3. they did not breach an implied contractual duty of good faith as WTO insisted they undertake the development of the idea in their private capacity; and (alternatively)
4. even if the WTO proposal was available to the University to pursue, there was a 'paradigm shift' in the invention process which resulted in the E Commerce System – a totally different product to that first suggested to them at the University.²⁶

The decision

The Court handed down judgement on 18 February 2004 and found for the University, but on only one point. It held:

1. there was no properly constituted policy on IP at the time that could be regarded as binding on the defendants. A proposed policy was drafted but was never ratified by the University Council;
2. the invention was made outside of the scope of the employment of the academics and without substantial use of University resources, so the University did not own the IP; but
3. the defendants breached a fiduciary duty by diverting the project to their private selves and not working on it in their capacity as employees.

In reaching this conclusion, the Court:

1. rejected that WTO wanted the defendants to work on the project privately, rather the Court considered that WTO was interested in the prestige of having the University associated with the project;
2. held that the conduct of the defendants did not support an argument that they were acting in a private capacity, especially as they used the names and logos of the University in correspondence and presentations with investors; and
3. also rejected the argument that a total paradigm shift in the project occurred, but rather considered that the change was part of a continuum.

The Court awarded the University an account of the first and second defendants' share in the software. A discussion of the reasoning on these various points is set out below.

The Intellectual Property Policy

The academics' employment contracts stipulated that the conditions of their service included all "university policies". The University contended that the IP Policy it had drafted in 1994

was one of the University policies referred to in their employment contracts. In 1994, the Vice-Chancellor circulated the IP Policy to the Vice-Chancellor advisory committee, included it on his registry database and gave a copy to the Office of Research who were responsible for publicising and advising on the policy. The Court held that this action was not enough to make it official university policy and therefore it was not binding on the defendants by way of their employment contracts.

The Court looked at the University's founding statute²⁷ and found that the University Council,²⁸ as the governing authority of the University, was the only body qualified to make a statute and binding policy.²⁹ The Vice-Chancellor was empowered as the Chief Executive Officer of the University by the Act³⁰ but there was no evidence that the Act prescribed power to make policy binding on University employees. The Court took as evidence of the lack of a real IP policy the fact that the University's human resources manual never incorporated the IP Policy, although the manual had been regularly updated since. Further, the IP Policy was never published in any other staff manual or any equivalent publication.³¹ Also, many references to it within the University hierarchy called it a draft policy and, at the 2001 meetings where the current policy was first mooted, the committee specifically queried the validity of the 1995 document.

The Court rejected the alternative argument that in some way Feaver and Wilson had acquiesced to the policy and were now estopped from disputing its validity as in this case the Court was not able to find any direct evidence that they had seen or approved the IP Policy or had any dealings within the University premised upon an understanding that the 1995 policy was in existence.³²

Therefore, without a valid IP policy binding the defendants at the time, the University had no prima facie right to assert ownership over the IP generated on the basis of a contractual term.

Inventions made while an employee

Outside of direct contractual agreements on IP, statutory provisions³³ and case law³⁴ have settled that IP rights in an invention made by an employee revert to the employer where an invention is made:

- which affects the business of his or her employer;
- while doing that which he or she is engaged to do;
- during work hours; or
- using the materials of the employer.

The University argued that all limbs were satisfied in the case of Wilson and Feaver's invention. The Court disagreed, holding that the invention was outside the scope of their employment. The Court rejected the argument that it was enough that the academics were paid to be, amongst other things, researchers and that the invention was the product of research.³⁵ Rather, the Court limited the scope of how the term 'to research' could be applied to employment of academics. The Court confined the scope of 'research' to the kind directed to the preparation of teaching and presentation of peer-reviewed learned papers.³⁶ Nettle J said "So far as I can see, the sort of research expected of them was limited to the kind of intellectual analysis which typifies social science academic inquiry",³⁷ not research into computer modelling.³⁸ Thus, although the software could be applied to international trade and economics, which was in their scope of research, the *invention itself* was a computer platform. It was invented in the domain of software architecture, statistical flows and function modelling and was therefore totally outside their employment as economics researchers. The Court accepted the argument that before the advent of the WTO proposal it had not been conceived by any party that the sort of research they were retained to conduct could lead to patentable invention.³⁹

The University argued that because the University was developing partnerships with industry as a way of

seeking outside funding through commercialisation of research, the activities of Wilson and Feaver with IP3 and PwC were well within the scope of their duties.⁴⁰ It was recognised though that such duties were not the usual practice for the whole University, only selected departments that dealt with biotechnology and information technology. On this point, the Court held then that responsibilities in one area of the University could not be attributed equally over the whole University. Thus, an information technology professor may be involved in research on the implementation of computer based e-commerce, but the Court suggested this was not the sort of research that Wilson and Feaver, in the Economics and Business schools, were engaged to conduct.⁴¹

A novel approach applied by the Court was more favourable to the University. At the start of their employment and at every subsequent contract review it was not conceived that Wilson and Feaver would or could invent a patentable invention in the course of their duties. But even though they were not therefore 'hired to invent' it was their status *at the time of invention*, not at the time of employment that was decisive. The Court had regard to the station of the academics in the University. As Departmental Heads they had authority to approve expenditure, negotiate contracts, commit staffing resources and supervise research. They had authority to commit the University to deal with WTO in developing the on-line course without seeking outside approval, which they did without hesitation. The resultant invention led from that affiliation. Hence they themselves determined that the scope of their work included a role to invent. Therefore, the resulting IP belonged to the University.⁴² Paradoxically for the University, the logical progression of this reasoning is that just as the academics had authority to commit the University to WTO they also had the authority to decide the project would cease to be a University project. Thus the September 1999 distribution of the IP amongst the three defendants was effective in divesting the University of any claim in IP. The work the academics performed after that point in inventing the system was on their own

account. So the Court held that the University had no IP rights in the later developed E-Commerce System.

The University's lack of IP rights does not of course necessarily mean that the defendants' decision to take the job away from the University and make it a private project was not a breach of a contractual duty of good faith or a fiduciary duty. However, the Court emphasised that the remedy for a breach of contract is damages and an account for profits, not some sort of divesting of IP rights.⁴³

Fiduciary Duty

Usually an employee owes a fiduciary obligation⁴⁴ to account to the employer for gains derived as a result of the employee's position and for opportunities which the employee learns of in the course of employment, unless full and frank disclosure is made and consent given. The Court concluded that the act of appropriating the business opportunity to themselves was a breach of those fiduciary obligations for the following reasons:

1. the WTO proposal was presented to the first & second defendants in their capacity as employees. Although Buccheri had a personal association with them he brought the opportunity to them at the University because he wanted the project to be seen by potential investors as associated with the University;⁴⁵
2. WTO would have commissioned the University to design the system if VUT offered and it is plain that the University would have had the capacity to design it. The Court took it as self evident that the University had enough academics with the skills to design the system if the idea was presented to it;⁴⁶
3. the effect of the 15 September agreement was to take away from the University the opportunity to design the system and to enrich the defendants personally from the project;⁴⁷
4. the supposed 'paradigm shift' in the project did not bring the original project to an end and the resultant invention was not so unrelated to what went before as

to not be affected by the breach of duty. Close comparison of the schematic changes showed that the shift was a change in the system design and not a fundamental direction alteration.⁴⁸ In fact the Court doubted that the whole 'paradigm shift' was a reflection of the defendants' mindset at the time and considered rather that it was later conceived to justify their actions; and

5. there was no full and frank disclosure such as might have relieved the defendants of being in breach. The academics did not give anything but the sketchiest details of the project to their immediate supervisor and their guarded comments were calculated to give the impression that their work would be of no real benefit to the University.⁴⁹

In terms of the third defendant, Astill, the Court found that he was not in a direct fiduciary relationship with the University as he was not an employee and would not be expected to report to the University in any way.⁵⁰ Nor was he connected as a third-party as the Court held that a stranger to a breach of trust is only liable if he or she knowingly assists the fiduciary in a dishonest and fraudulent way. Although Astill was involved from the beginning, he had no direct dealings with the University and relied on the assertions of Wilson and Feaver that they were working in their private capacity.⁵¹ There was no requisite dishonest state of mind on his part. Rather, he was acting on a mistaken understanding of the state of affairs and the Court held this was insufficient to join him to the breach of fiduciary duty.⁵²

Consequences of the breach:

The Court had to determine how the first and second defendants should account for the act of appropriating the business opportunity to themselves. The value of this opportunity was much less than the value of the resulting E-Commerce System and trading software. The difference was due to the time, energy, skill and financial contributions of the defendants.⁵³ Furthermore, it was not

as if the defendants were presented with the software and system itself, they were presented with no more than an opportunity to create it. However, because their actions excluded the University from this opportunity the Court held the academic defendants liable to the University for the trading software and E Commerce System.⁵⁴ The Court applied the High Court's reasoning in *Hospital Products Ltd v USSC*⁵⁵ which was that where the value of a business acquired as the result of a fiduciary breach results from the skill, effort and property of the fiduciary, it would unjustly enrich the plaintiff to compel an account of *all* the profits. The Court therefore made an allowance for the contribution of the defendant's work in creating the software and the system.⁵⁶

In terms of an account of the defendants' interest in the resultant E-Commerce System patent, and the resultant Electron and Ether systems (**Systems**), the Court had to decide whether the development of these systems was direct exploitation of the trading software and E-Commerce System in breach of fiduciary duties or rather a private initiative outside of fiduciary duties. The Court found that the Systems were based upon the trading software and E-Commerce System – they were a method of marketing them – and practically speaking could not have been developed without a knowledge of them. That being the case, it was held that the opportunity to develop, with PwC, the Systems to give effect to the trading software and E-Commerce System was something, which in equity, should proportionally belong to the plaintiff University.⁵⁷ The Court reserved its opinion on what that proportion was. Bearing in mind that the Systems represented an aggregation of concepts and systems, of which the trading software and E-Commerce System was only one, the exact commercial value of them to the Systems was to be determined by later hearings on damages.⁵⁸

The Court was not concerned with the transfer of the IP rights from the defendants to IP3 as the defendants were the mind of IP3 at the time of transfer. But the investment of innocent third parties, including PwC, into IP3 altered this position. From that point on IP3 was no longer the

exclusive alter-ego of Wilson and Feaver. It was a company with a number of parties who in good faith invested in the development of Electron and Ether. Therefore, the Court refused to impose a constructive trust over the whole company as this would unfairly advantage the plaintiffs over third party creditors.⁵⁹ The relief granted to the University was an account for the shares that Wilson and Feaver held in IP3. As IP3's only assets were the patents and the software, for which the defendants had to account to the University, the Court held that these shares represented the gain derived by reason of their breaches of duty. Wilson and Feaver were ordered to pay to the University an amount equal to the value of the shares they currently owned and the proceeds from the sale of shares they had already divested.⁶⁰

The defendants were, as mentioned above, able to make an allowance from this payment for their own time, skill and capital invested in the company. The Court was of the opinion that a generous view should be taken of the worth of their contributions⁶¹ but also that a credit was to be applied for the time and resources misappropriated from the University in development of the products.

Summary

This case is notable as the first case in Australia to discuss the issues of IP in the context of a university and as such, is instructive on some major points for the future commercialisation of university-produced products.

First, the case demonstrates that from a legal point of view it is essential to have an IP policy or statute that clearly sets out the position. Draft or quasi policies will not be enforced, either by contract, or by estoppel.

Secondly, the case also provides a timely discussion on the limits of the scope of faculty employment when determining ownership of IP, including:

1. the duty to 'research' in an academic's employment contract does not give wide ownership over any and all IP created with some 'research' component. Only research directly related to the

academic's employment will give grounds for employer ownership;

2. 'hired to research' does not mean 'hired to invent'. The two terms are not synonyms; 'research' means scholarly pursuit whereas 'invention' means direct application of research. Therefore, the duty to research does not incorporate a duty to invent and in the general course of things it is outside the scope of employment of a researcher to invent;
3. within a university context, the higher the standing of an academic and the more control and power they have over their own work direction the wider *the scope of their employment is*; and
4. equitable remedies can successfully interact with IP law and can make up the shortfall of statutory IP protection. In this case, notwithstanding the lack of formal IP protection, a fiduciary duty put the University in a similar position as it would have been if it had owned the IP directly.

Conclusion

With cuts in government funding over the last decade there has been greater pressure within the university sector to commercialise their knowledge stock. This comes at a time where corporate research and development expenditure is decreasing. Australian industry, especially in information technology, is looking to universities to provide the innovation for it to market. University spin-off companies, start-up ventures, technology licensing and the like are fuelling a multi-million dollar synthesis between universities and the private information technology sector in Australia. With this new commercial character in the previously cloistered world of academia it is predictable that conflicts will arise. It was only a matter of time before a dispute over ownership of IP between academic inventors and a university would occur. An analysis of the conduct of the parties in this case is a timely reminder of the issues faced in working with university IP and in many ways serves as a cogent lesson to academics, universities and

commercial backers in what not to do when a similar situation arises.

- 1 [2004] VSC 33
- 2 See *Redrock Holdings Pty Ltd v Adam Hinkley* [2001] 50 IPR 565 where copyright in a computer program library developed by the defendant while developing software in the employ of the plaintiff was held to be the copyright of the employer.
- 3 Although the concepts had been tested overseas, see Note 36 and 38.
- 4 Universities in Australia are increasingly becoming leaders in the commercialisation of IP, for example in 2003 out of the top 12 bodies filing for patents in Australia, 4 were Universities or University owned companies: Glen Mulcaster "Patent Genius Takes Quiet Approach" *Sydney Morning Herald* 4 May 2004 (Next) p 2. Further surveys have shown that a large number of computer programs, databases and other patentable inventions are produced as a result of research. A survey at Monash University has shown that 13.2% of academics produced research results as new computer programs and 7.3% produced some form of digital database - Ann Monotti "Allocating the rights in Intellectual Property in Australian Universities" (2000) *Federal Law Review* p 246.
- 5 One of the countries newest universities that was until recently Footscray Institute of Technology. It was established under the auspices of the *Victoria University of Technology Act 1990 (Vic)*. Although it has recently shortened its name to Victoria University, for the purposes of this article it will be referred to as it is in the Court case, VUT.
- 6 <http://www.business.vu.edu.au/cibre>
- 7 IP3 Pty Ltd, Jahupa Pty Ltd and Coap Pty Ltd Para 2 Note 1
- 8 Para 11 Note 1
- 9 Para 18 Note 1
- 10 Para 21 Note 1
- 11 Para 23 Note 1
- 12 Para 20 Note 1
- 13 Para 27 Note 1
- 14 Para 29 Note 1
- 15 Conceptually the difference is similar to the difference in the operating systems of Napster and Kazaa.
- 16 Provisional Patent Application No PQ 6289
- 17 Para 57 Note 1
- 18 Para 215 Note 1
- 19 Para 68 Note 1
- 20 PCT Application No PCT/AU01/0299 entitled "E-Commerce Transaction Facilitation System and Method"
- 21 <http://www.ip3systems.com/solutions/overview.asp> (last viewed 6 May 2004)

Back to School Over Ownership of Faculty Invented Software

- 22 The company website describes the product: “**Electron**TM software is owned and operated by any sized enterprise in either client managed or ASP hosted form. It is the first enterprise relationship management system to incorporate, within a single package: Search, Navigation, Catalogue/inventory management, Sales and procurement order management, Logistics requisition and management, and Comprehensive, dynamic back-end system integration. It is an extremely powerful, but compact B2B commerce software application possessing an extremely high degree of business process functionality.” See http://www.ip3systems.com/solutions_Overview.asp (last viewed 6 May 2004).
- 23 Further the website describes: “**Ether**TM is a dynamic enterprise/product directory with advanced search capabilities. It offers crucial navigational and network connectivity functions enabling buyers to quickly and easily identify opportunities for establishing new, mutually beneficial trading relationships. The **Ether**TM is maintained and operated by **iP³ Systems Ltd** and its partners. It is freely accessible from any web browser.” See http://www.ip3systems.com/solutions_Overview.asp (last viewed 6 May 2004).
- 24 An interlocutory injunction was first granted on 30 June 2003 to stop the defendants divesting their interests in their shares and royalties the subject of the litigation. See *Victoria University of Technology v Wilson* [2003] VSC 299.
- 25 In its 80 page Statement of Claim – Para 72 Note 1
- 26 Para 73 Note 1
- 27 *Victoria University of Technology Act 1990* (Vic)
- 28 To view the Universities governing structure go to the link, including the make up the University Council see : http://www.vu.edu.au/Home/About%20VicUni/diagrams_260.asp (last viewed 6 May 2004).
- 29 Section 7 *Victoria University of Technology Act 1990* (Vic) (**The Act**)
- 30 Section 23 (3) *Victoria University of Technology Act 1990* (Vic)
- 31 Para 82 Note 1
- 32 Para 94 Note 1
- 33 *Copyright Act 1968* (Cth) section 35 (6). *The Patent Act 1990* (Cth), though, has no express provisions that deal with employee inventions. In the absence of an express agreement the existence of employers rights are determined according to the general common law. See Note 34
- 34 See *Spencer Industries Pty Ltd v Collins* [2003] FCA Branson J at para 64-67
- 35 Logically one can see how this is a long bow for the university to draw. For example a taxi driver might invent something while driving. However because he is paid to drive and invented while driving does not mean inventing while driving comes under the scope of employment.
- 36 This is consistent with the approach of the English court in *Greater Glasgow Health Board's* [1996] RPC 207 at 212. In this case a junior doctor invented a device for examining the retina of the eye. The Health Board in the Department of Ophthalmology employed him as a Registrar. His contractual duties were primarily clinical but he was also expected to participate in undergraduate and postgraduate teaching and to avail himself of the research facilities provided. The doctor devised his invention at home in his own time while revising for Fellowship exams. The court held that the device, while a useful accessory for the doctor in his contracted work, was not an integral part of it. The court held that the duty to research does not incorporate a duty to invent, and it is outside the scope of employment of a researcher to invent.
- 37 Para 116 Note 1
- 38 Further see the seminal American case of *US v Dubilier Condenser Corporation* 289 U.S. 178, 199 (1933) where two employees were engaged in research and testing. During their tenure they developed 3 inventions regarding radio broadcasting to which patent was later applied. The Government as employer sued for an assignment of patent arguing that their employment as researchers implied invention. The court did not agree that the terms were equivalent. Rather it found research to be what might commonly be referred to as basic research, the elucidation of natural laws, and invention to be the application of such laws in the production of a beneficial product, device or process.
- 39 Para 116 Note 1
- 40 Para 110 Note 1
- 41 Para 110 Note 1
- 42 Para 122 Note 1. The court rejected the argument from the defendants that this commitment to work with WTO was made in a private capacity, not on behalf of the University. The defendants reasoned to the court that they always perceived they were working privately because it was outside of their expertise and they did not want to expose the university to liability if the work was poor. This evidence did not convince the court as it contradicted most of the documentary evidence that the work was being performed on behalf of the University.
- 43 See *Reading v R* [1948] 2 KB 268 at 276
- 44 Not all employees are fiduciaries. Only where there is a level of trust and responsibility bestowed on the employee and the employer is in a vulnerable position to the employee will it be regarded as a fiduciary relationship. Professionals, like the academics in question, are undoubtedly fiduciaries. See *Hospital Products Ltd v USSC* (1984) 156 CLR 41.
- 45 Para 151 Note 1
- 46 Para 168 Note 1
- 47 Para 156 Note 1
- 48 Para 172 Note 1. In evidence computer science experts said that the difference between intermediated website access and peer-to-peer connectivity is only a minor detail. Further they explained that it was a shift that was quite common at the time amongst Internet portals.
- 49 Para 175 Note 1
- 50 Para 187 Note 1
- 51 Para 188 Note 1
- 52 Applying the House of Lords reasoning in *Twinsectra v Yardley* [2002] 2 AC 164 at 170-1
- 53 Para 198 Note 1
- 54 Para 217 Note 1
- 55 (1984) 156 CLR 41 at 110 per Mason J
- 56 This allowance to the fiduciaries is given in equity because they did not act in knowing disregard of the university's interest in the opportunity. They were ignorant of their full obligations as employees, but of course the allowance would be different if they had acted wholly dishonestly.
- 57 Para 208 Note 1
- 58 Para 224 Note 1
- 59 Applying the *Distronics Ltd v Edmonds* [2002] VSC 454 at para 213
- 60 Para 215 Note 1
- 61 Para 223 Note 1
-