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Redrock Holdings Pty Ltd & Hotline Communications Ltd & Ors v Hinkley  
[2001] VSC 91 (4 April 2001)

Last Updated: 4 April 2001

SUPREME COURT OF VICTORIA

COMMERCIAL AND EQUITY DIVISION

INTELLECTUAL PROPERTY LIST

Not Restricted

No. 7088 of 1999

No. 7158 of 1998

REDROCK HOLDINGS PTY. LTD.

Plaintiff

v.

ADAM HINKLEY AND OTHERS

Defendants

- and -

HOTLINE COMMUNICATIONS LTD AND OTHERS

Plaintiffs

v.

ADAM HINKLEY AND OTHERS

Defendants

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JUDGE:

HARPER, J.

WHERE HELD:

MELBOURNE

DATE OF HEARING:

17-21, 24-27, 31 JULY;

1-3, 7-10, 14-17, 21-24, 28-31 AUGUST;

6, 7, 11-15, 18-21 SEPTEMBER 2000

DATE OF JUDGMENT:

4 APRIL 2001

CASE MAY BE CITED AS:

REDROCK HOLDINGS PTY. LTD. AND HOTLINE COMMUNICATIONS LTD. v. ADAM  
HINKLEY & ORS.

MEDIUM NEUTRAL CITATION:

[2001] VSC 91

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CATCHWORDS:

INTELLECTUAL PROPERTY - Copyright - Computer software - Class library  
- Internet software - Whether class library and Internet software  
written by employee in the course of his employment - Whether a  
contract of employment or a contract for employment - Control - Highly  
skilled and professional employee - Stevenson Jordan & Harrison Ltd.  
v. MacDonald & Evans [1952] 1 TLR 101; Beloff v. Pressdam Ltd. [1973]  
1 All ER 241; Stevens v. Brodribb Sawmilling Company Pty. Ltd. (1986)

160 CLR 16 applied - Relationship between class library and applications written with it - Whether software written substantially during working hours - Whether a new literary work - Copyright Act (Cth.) 1968, s.35(6).

CONTRACT - Alleged fraudulent misrepresentation - Whether agreement valid - Whether partial assignment of copyright in software - Uncertainty of description of software being assigned - Subject matter of the contract - Codelfa Construction Pty. Ltd. v. State Rail Authority of NSW (1982) 149 CLR 337 applied - Copyright Act (Cth.) 1968, s.196(2) - Whether first defendant under a special disability - Whether unconscionable conduct.

INTELLECTUAL PROPERTY - Whether a subsequent class library amounted to an infringing copy of the original class library - Innocent reproduction - Copyright Act (Cth.) 1968, s.116(2)(b) - Whether any infringing copy held on trust.

FIDUCIARY DUTY - Whether breach of fiduciary duty - Whether breach of Corporations Law, s.232 - Whether second and third defendants aided, abetted, counselled or procured any breach of fiduciary duty and Corporations Law.

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#### APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

Mr. S.K. Wilson Q.C. with

Mr. M.J. Colbran Q.C.,

Mr. M.S. Goldblatt,

Mr. W.E. Alstergren and

Mr. R.S. Wotherspoon

Davies Collison Cave

S.W. White Computer Law

(for Redrock Holdings Pty. Ltd. before 27 July 2000)

For the Defendants

Mr. A. Hinkley in person

Mr. P.S. Hinkley in person and for Meta Consultants Pty. Ltd.

HIS HONOUR:

These proceedings concern an acrimonious dispute about the ownership of software written by Mr. Adam Hinkley, the first defendant in each proceeding. Mr. Hinkley's father, Mr. Paul Hinkley, and Mr. Paul Hinkley's business vehicle, Meta Consultants Pty. Ltd. ("Meta Consultants"), are also defendants to the proceedings.

There is no dispute that Mr. Adam Hinkley was the author of the programs in question. Rather, the issues in contention concern the identity of the owner of the copyright in the programs. Contesting Mr. Hinkley's ownership are an Australian company, Redrock Holdings Pty. Ltd. ("Redrock") (formerly called A2B Telecommunications Pty. Ltd.) and a Canadian company, Hotline Communications Ltd. ("Hotline Communications"). Redrock alleges that it employed Mr. Hinkley between 3 November 1995 and 23 September 1997 as a software programmer and, as such, the copyright in the subject programs vested in it pursuant to s.35(6) of the Copyright Act 1968 (Cth). Hotline Communications, a company established by Mr. Hinkley with a group of Canadians to develop and market certain software programs created by him, claims ownership of the subject programs on the basis that Mr. Hinkley assigned that ownership to it in or about September 1997. During the early stages of the trial before me a compromise was reached between Redrock and Hotline Communications. I understand that, by this compromise, all the former's claims to copyright in any of the software in dispute were assigned to the latter. Each, however, continued to pursue its individual claims against Mr. Adam Hinkley, his father and Meta Consultants.

I will consider first the case brought by Redrock. In addition to claiming copyright in the programs, Redrock alleges against Mr. Adam Hinkley (a) breach of certain contractual obligations which it asserts are to be implied into his contract of employment; (b) breach of obligations under s.232 of the Corporations Law; and (c) breach of certain fiduciary obligations. To a large extent the determination of these claims will turn upon whether Mr. Hinkley owned the copyright in the software. As against Mr. Paul Hinkley and Meta Consultants,

Redrock alleges breach of copyright. It also alleges that, being aware both that his son was writing the software in the course of his employment with Redrock and that Redrock was unaware that those programs were being developed for the benefit of Hotline Communications and Meta Consultants, he aided, abetted, counselled or procured and induced and was knowingly concerned in or was a party to the contraventions of the Corporations Law. Redrock further alleges that Mr. Paul Hinkley and Meta Consultants assisted Mr. Adam Hinkley to breach his fiduciary obligations by receiving or purporting to receive a licence to use the programs either with knowledge of the breaches by the latter, or wilfully shutting their eyes to such breaches, or wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make, or with knowledge of circumstances that would indicate a breach. Redrock claims that any such licence is held by the defendants as constructive trustees for it. A cause of action is also brought against all the defendants in conversion.

Adam Hinkley is a young man of great talent. He is a computer programmer. Before he left school, he had embarked on the development of a "library" (he referred to it as a "class library") as that expression is defined in the computer lexicon: that is, a collection of files, computer programs, or sub-routines; a collection of reference materials and software tools: see Dictionary of Computer and Internet Terms (6th ed.) by Douglas Downing, Michael Covington and Melody Covington. Another definition, used in this case by Professor Justin Zobel, Associate Professor, Department of Computer Science, RMIT University, is "a collection of functions that a programmer can call upon when writing a piece of software." Mr. Hinkley defines the expression "class library" as "a software tool that is used for making other software". One of the features of this library is that it comprises reusable code that can be used in many applications. Moreover, it was designed as a "cross-platform" program which is defined as being "applicable to more than one kind of computer (e.g. PC and Macintosh)": Dictionary of Computer and Internet Terms (supra.). In this case, the library was used to write, or assist in writing, software that is indisputably owned by Redrock as well as software that was being developed by or on behalf of Mr. Paul Hinkley and Meta Consultants. It was similarly used by Mr. Adam Hinkley in writing software which according to him was exclusively his.

Among the items of software written by Mr. Hinkley which are the subject of these proceedings are programs called Hotline and eText. The first is a product designed for use in conjunction with the Internet. There are three components to this program: a real-time "chat" facility, a means of transferring parcels of information such as video clips or music from one computer to another using FTP (File

Transfer Protocol), and a news or electronic bulletin board facility. The second, eText, is a software program the purpose of which is to assist the uninitiated in the use of computer keyboards. It has no Internet-related function. This program was being written by Mr. Hinkley with his father. The Hotline software has already proved that it has a commercially viable future. eText may or may not have significant commercial potential.

Given the issues in this case, it is relevant to describe briefly the general nature of a computer program. It is a set of instructions designed to cause a computer to perform a particular function or to produce a particular result. Such a program is usually developed in a number of stages. One of these involves the preparation of a source code, an expression which is defined in the Dictionary of Computer and Internet Terms (supra.) as: "A programming language designed for use by human beings, as opposed to object code, which is used internally in the computer. A compiler translates source code into object code". Source code, therefore, is not far removed from ordinary language. It is accordingly referred to as a high level language. In this case the source code language adopted by Mr. Hinkley is known as C++.

The source code cannot be used directly in the computer. It must first be converted into an object code, which is "machine readable". The conversion is effected by a computer program, known as a "compiler", which translates the high level programming language, or source code, into machine readable language. Object code is therefore defined in the Dictionary of Computer and Internet Terms (supra.) as the output of a compiler; it is a program written in a language recognisable by the central processing unit of the computer but (at least in general terms) is incapable of being read by humans. The central processing unit is the centre of control for arithmetical and logic operations within the computer's microprocessor. It consists of an arrangement of electronic circuits which are activated by impulses of electric current. A logic gate within the central processing unit is either turned on or off depending on the presence or absence of such pulses. As a cross-platform program, the class library could be used to write source code that could be compiled on a Macintosh computer and then, using the same source code, could be compiled on a PC to produce a Windows product (T. 2687). This would, presumably, avoid the necessity to write two sets of source code.

Adam Hinkley was, and is, justifiably proud of his class library. According to Mr. Hinkley's witness statement of August 2000, he began working on it "at approximately the start of 1995"; yet its commercial potential was first exploited as early as July that year. On 15 July, Mr. Hinkley granted a "non-exclusive licence for the use of the software" then named "Adam's App Builder" to Meta Consultants.

That software was designed "to speed up the development of Macintosh applications comprising [a] class library of C++ classes for user interface components such as buttons, check boxes, scroll bars, etc., window management routines, file management routines [and] array and other data management": see the copy letter dated 30 June 1995 but signed by Mr. Hinkley "in agreement" (that is, by way of evidencing his agreement to the grant of the licence) on 15 July 1995 (Exhibit PH 8). The fee for the licence was \$200. According to the terms of the letter, "complete ownership" of "Adam's App Builder" remained with Adam. Meta Consultants was, however, to retain complete ownership of software products built with it. eText is among the most important of these; but so are programs (such as that known as "SPFS") written for Redrock, to say nothing of that assigned to Hotline Communications. I shall later (see paragraph [130]) advert to the fact that neither licensee nor licensor turned his mind to the potential difficulty posed by the provision that "complete ownership" of all these programs was (if the licence agreement meant what it said) to remain with Meta Consultants.

By this time (July 1995), while barely half way through the course of his study as a year 11 student, Mr. Hinkley had had enough of school. He was then 17 years of age. He thought that he could, with profit and personal fulfilment, better exercise his talents in the world of information technology. He therefore, in about August 1995 (although the timing is somewhat uncertain), placed an advertisement on the Internet. It broadcast his skill as a software programmer. Shortly afterwards, Mr. Ross Spearritt, a director of Redrock, replied expressing interest; and on 20 August Mr. Hinkley sent his resume to Mr. Spearritt via the Internet. Under the heading "Projects" the resume states:

"Currently, I am working on an extensive application framework (C++). Its main focus is the creation of powerful applications with minimal programming effort. It allows easy creation, management, and manipulation of interface elements (windows, buttons, menu bars, lists, text boxes etc.), and other application objects such as files, documents, tasks, arrays, and strings. Automatic error handling, data streaming and object I/O are core elements of the framework."

In cross-examination Mr. Spearritt, who has no particular expertise in Macintosh technology, and who has not examined the source code of the library, could not say whether this was a description of what he later learned to be the library. However, he indicated that Mr. Samuel Vaughan, a Macintosh programmer employed by Redrock after Mr. Hinkley left, did tell him that the library performed these sorts of functions.

A2B Telecommunications Pty. Ltd. had been incorporated in 1991. It became Redrock in mid September 1999. It develops "networking solutions" to enable computers to "talk" with each other, whether over wide area networks such as the Internet or over local networks. Its founder was Mr. Michael John Hamilton. Like Adam Hinkley, his professional expertise was as a computer programmer. His employment experience lay, in part, in what is known in the computer world as the "messaging market" for personal computer-based applications.

An example of a messaging system for personal computer-based applications is a product called "WinPage". This technology allowed a user to send text messages from a personal computer to a radio pager. The interest of both Telstra Corporation Ltd. ("Telstra") and British Telecom was excited. But WinPage (later called "MessageNet" or, in its Telstra version, "MobileNet Mail") was a Windows product. There was no Macintosh version of it. Redrock decided to create one. It had a particular reason for wanting to do so. In addition to the interest of Telstra and British Telecom, among its principal clients was Optus Communications Ltd. ("Optus"), a large user of Macintosh products.

By the last quarter of 1995 Redrock was therefore ready to employ a programmer with Macintosh skills. Adam Hinkley had those skills, as he demonstrated during a meeting with Messrs. Hamilton, Spearritt, and another Redrock director, Rohan Lean. After exchanging a number of e-mails with Mr. Spearritt, Mr. Hinkley requested the meeting to demonstrate the Macintosh version of the WinPage user interface he had prepared. The meeting took place in October 1995. Mr. Hinkley's account of the preparations for this occasion, as set out in his written statement of 7 August 2000, is as follows:

"In about September 1995 I placed an advertisement on the Internet seeking work as a computer software programmer. Soon after, Mr. Ross Spearritt, a director of Redrock replied to my advertisement by e-mail. In his reply, Mr. Spearritt advised me that Redrock had released a 'Windows' version of a product called 'MobileNet Mail' and was wanting to develop a Macintosh version of the same product. ...

Soon after I had replied to Mr. Spearritt's e-mail, he sent me a copy of the Windows version of MobileNet Mail on disk to my home address. He wanted to know how long it would take me to write a Macintosh version of the said product. I examined the program.

I had no formal qualifications, no formal training, no prior experience, no degree in computer science, no university or TAFE qualifications or training, and not even a résumé. I did not finish year 11 of High School and my age was 17.



I was concerned that I would not get the job due to my lack of qualifications and experience, and not finishing High School, so to prove my ability, I wrote the first stage of the Macintosh version of the product. This included a complete user interface to match the Windows version. I used two tools to achieve this, AppWarrior (AW) and CodeWarrior. Redrock did not pay me for this. I then sent an e-mail to Mr. Spearritt where I provided an estimate of how long I thought it would take to finish development of the Macintosh version of MobileNet Mail and I advised him that I had some software to demonstrate to him. Soon after, he replied by e-mail proposing an appointment for an interview."

Mr. Hinkley brought with him to the interview his Macintosh prototype of WinPage. There was some dispute at trial about the degree of sophistication of this prototype, but it appears that it comprised a graphic representation of the user interface with limited functionality. Mr. Hinkley had, in creating his prototype, employed the resources both of his "class library" (then called the "Imaginary Library", but later renamed "AppWarrior" or simply "AW" and which included in it a tool called "ImagEdit" that allowed rapid development of visual aspects of a Macintosh program) and a commercially-available library named "CodeWarrior". He says that he informed the others present at the interview of this fact, and showed them ImagEdit. This was a tool which, as he told them, he had written himself. Mr. Hamilton gave evidence that he thought Mr. Hinkley had used CodeWarrior to write the prototype, although he can recall being shown the ImagEdit tool and being told that it had been used to paint the controls on the screen. Mr. Spearritt recalls that Mr. Hinkley demonstrated a programming tool (which was not identified at that stage as ImagEdit), but he does not remember being shown the library.

The interview achieved its purpose. Several days later, Redrock offered Mr. Hinkley a position. Mr. Hinkley accepted. In doing so, he assumed (he says) that the library would remain his; and there can be no doubt that, before he joined Redrock, it was with him that the copyright resided. For the purposes of the Copyright Act 1968, a computer program or compilation of computer programs is a literary work: s.10. By s.31(1) of that Act, copyright in relation to a literary work is (unless the contrary intention appears) the exclusive right to (among other things) reproduce the work in a material form, to publish it, to make an adaptation of it and, if it is an adaptation, to reproduce or publish that adaptation. Subject to s.35 of the Act, the author of a literary work is the owner of any copyright subsisting in it: s.35(2). Where, however, a computer program is made by its programmer in pursuance of the terms of his or her employment under a contract of service, the employer is the owner

of any copyright subsisting in the program: s.35(6).

Mr. Hinkley's argument that he retains the copyright in the class library is based upon three propositions. First, that by his agreement with Redrock the class library was to be made available, in effect, to Redrock by Mr. Hinkley - as his tool, but one which he was prepared to use in the service of his employer. Secondly, that he created the library wholly or almost entirely outside working hours, both before and during the period of his employment by Redrock. Thirdly, that the AW library was conceived, designed, developed and used by Mr. Hinkley at least as much for purposes which had nothing to do with Redrock, but everything to do with non-Redrock products such as Hotline and eText, as for work-related purposes.

I will turn first to the agreement between Redrock and Mr. Hinkley. It was, according to Mr. Hinkley, agreed that he would continue to use the library and ImagEdit as a tool with which to produce software for his new employer. How this could be reconciled with Meta Consultant's "complete ownership of software products built with" the library has not been explained. It was not argued by the defendants, however, that Meta Consultants owned any of the software written for Redrock, save for the library itself. Mr. Hinkley says that he took it that it was implicit that he would continue to develop the library but that there was no agreement, express or otherwise, that he would develop it for the company. He gave evidence that it is in the nature of programs such as the library that they will be continually developed and frequently updated. This is undoubtably true. He says it was not necessary for him to develop the library to write programs for Redrock; rather Redrock got the "free benefit" of his continuing work on the library. He further asserts that there was no agreement to transfer the copyright in the library from him to the company.

Mr. Hamilton confirmed that there was no discussion about copyright in the library or the ImagEdit tool, although he became aware during the ensuing weeks that Mr. Hinkley was developing the library. Mr. Hinkley was simply instructed to write software to achieve a particular end: how he achieved that end - either by using a library or otherwise - was up to him provided it was done expeditiously and the software was suitable for its purpose. Redrock was concerned only to employ someone who could write computer programs that would meet the requirements of its customers. Mr. Hinkley knew, or ought to have known, that those customers, and Redrock itself, would see as one of the necessary contractual concomitants (and in that sense as one of the customers' "requirements" which Redrock would have to meet) that the rights for which the customers were contracting not be deleteriously affected by any adverse copyright interests.

Mr. Hinkley relies upon the circumstance that there was no express agreement for the transfer of copyright in the library from him to Redrock. But if, having taken to his new employer a library which was then in embryonic form, Mr. Hinkley in pursuance of the terms of his employment under a contract of service transformed that library into something that was qualitatively and quantitatively quite different, the copyright in the work will vest in Redrock by virtue of the operation of s.35(6) of the Copyright Act 1968. It is not necessary for there to be any transfer agreement or licence, either written or oral. In such circumstances, copyright in the qualitatively and quantitatively different library vested in Redrock by operation of law.

Mr. Hinkley submits that he was employed under a contract for services rather than under a contract of service. He relies on the so-called "control test", saying that he was given little, if any, direction or control by Redrock and cites passages from the judgment of Evershed, MR in *Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans*[1]. However, legal authority to control, while remaining relevant and indeed often decisive, is no longer the sole determining factor when assessing whether a person is employed under a contract of service, in particular where that person exercises a high degree of professional skill and expertise in the performance of his or her duties. So, in *Beloff v. Pressdam Ltd.*[2] Ungood-Thomas, J. cited with approval a number of passages to this effect and then said at 250: "It thus appears, and rightly in my respectful view, that, the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service. Control is just one of many factors whose influence varies according to circumstances. In such highly skilled work as that of the plaintiff it seems of no substantial significance. The test which emerges from the authorities seems to me, as Denning LJ said, whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether his work is not integrated into the business but is only accessory to it, or, as Cooke J expressed it, the work is done by him in business on his own account." In this case, there is no doubt that Mr. Hinkley as a software programmer exercised a high degree of professional skill and expertise in the performance of his duties for Redrock. Moreover, as a skilled Macintosh technician employed to fill a gap in Redrock's technical staff, it could be expected that even as an employee he would be given a great deal of latitude. I therefore conclude that the evidence about control does not in the circumstances of this case establish that Mr. Hinkley was employed under a contract for services.

In his judgment in *Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans*[3] Lord Denning expressed reservations about the control test,

and instead enunciated the famous passage which was to become the "integration test": "As [Evershed MR] has said it is almost impossible to give a precise definition of the distinction [between a contract of service and a contract for services]. It is often quite easy to recognise a contract of service when you see it, but very difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to me to run through the instances is that, under a contract of service, a man is employed as part of the business and his work, although done for the business, is not integrated into it but is only accessory to it."

The "integration" or "organisation" test has not been embraced by the High Court of Australia. However, it may be helpful in an appropriate case as one indicator of the totality of the relationship between the parties, all aspects of which must be considered: *Stevens v. Brodribb Sawmilling Company Pty. Ltd.*[4]. In doing so, I find that Mr. Hinkley's work as a software programmer was integrated into the business of Redrock. Mr. Hamilton gave evidence in his witness statement that in the first four years of its business Redrock's emphasis was in developing the intellectual property in its products and that, after its staff, those products were the most significant asset of the company. Mr. Hinkley's work as a programmer was therefore central to developing the business of Redrock.

There is other evidence which satisfies me that Mr. Hinkley was employed under a contract of service. He was on a fixed salary, from which group tax was deducted. He signed an Australian Taxation Office Employee Declaration on 3 November 1995. He was entitled to annual leave, to sick leave and to long service leave. Superannuation contributions were made by Redrock on his behalf. Redrock provided Mr. Hinkley with necessary equipment and with programs such as CodeWarrior all specially purchased to assist him in writing software for the company, together with access to the Internet to download manuals, information or software as needed. Indeed, in his written submissions Mr. Hinkley states on the issue of the use of an external hard disk owned by him that it would be "unbelievable to suggest that I was expected to use my equipment for Redrock's work". All the indicia put forward in the evidence are consistent with the conclusion that Adam Hinkley became an employee of Redrock in or about November 1995.

Mr. Hinkley subsequently worked on a number of projects for Redrock including MobileNet Mail, SMS Monitor, a transaction protocol for Windows and a program called SPFS ("Service Provision Fallback

System"). It was work which fell squarely within the terms of his employment. Indeed, SPFS was the principal piece of software written by Mr. Hinkley for Redrock using the library. This program was designed to be used by Optus to provide services, generally telephone services, to its clients by enabling Optus employees to activate telephone numbers of clients wishing to transfer from Telstra to Optus or create a new account. Although described as a "fallback" system, SPFS was used extensively by Optus during its ordinary operations. It was essential therefore that any problems with SPFS (including problems which arose when developments elsewhere required consequential modification to the SPFS software) be capable of being rectified expeditiously. Indeed, I am satisfied that Mr. Hinkley understood and accepted that any software written by him for Optus (and not only for Optus, for any client) should not only operate as efficiently as possible but be susceptible of modification to meet the needs of the client and the inevitable and rapid changes that are an integral part of the software industry. So, for example, it was obvious that any program written for Optus must be able to accommodate any upgrade to the Macintosh operating system.

A very significant aspect of this case, already touched upon, must now be emphasised. The library was from November 1995 being developed not only to better serve as a tool with which to write software (a) for Adam Hinkley and his father, and (b) for the clients of Redrock, but also as a necessary component in the operating capacity of all the software in categories (a) and (b). In other words, the latter, as well as being built by means of the former (that is, with the class library being used as a tool), could not "run" without the class library.

In these circumstances, if Mr. Hinkley proposed to fulfil his obligations to his employer by drawing upon the library by means which might in the absence of prior agreement blur the question of ownership of the copyright in the library, it fell to Mr. Hinkley, as the only repository of the relevant information, to place his employer in a position from which employer and employee, both being fully informed of the relevant facts, could either negotiate a mutually satisfactory resolution to the copyright problem or go their separate ways. After all, it was Mr. Hinkley, not his employer, who knew of his plans for the development, in conjunction with the library, of Hotline and eText. He was therefore uniquely well placed to appreciate his need for the protection of his copyright in the library. And it was Mr. Hinkley, not his employer, who by reason of his authorship determined the extent of the reliance of the software written for his employer on that library. Mr. Hinkley was therefore also uniquely well placed to appreciate the extent of his employer's need for protection, including the protection given by copyright, of its interest in the

functionality of the software which he wrote for his employer.

By contrast, it was immaterial to Redrock whether Mr. Hinkley developed the software that he was employed to write by resort to one "library" or another - or, indeed, if it was technically feasible, by resort to no library at all. It was similarly immaterial to Redrock whether Mr. Hinkley so arranged the software he wrote that some part of an entire package could or could not function independently of another part of the package; if he chose to design a program in such a way that some part of it could not "run" without resort to another, that was his business. But he was employed to create a functional software package, and Redrock were entitled to such protection as was necessary to ensure that functionality.

The relationship between the library and the various other programs written by Mr. Hinkley is one of the key issues to be determined in this case. In particular, the question is to what extent can it be said that the various programs which use the library are so critically dependent on it that the library cannot be regarded as separate. The determination of this issue will have a bearing on whether it is appropriate to conclude that the library was written in the course of Mr. Hinkley's employment. There are two aspects to this point: was the relationship between the work done on the library and the tasks set by Redrock so interdependent that they amounted to the same work; and, to what extent did Mr. Hinkley write the relevant programs in his own time and for his own purposes?

It is clear that the "Imaginary Library" which Mr. Hinkley brought to Redrock was in an embryonic form. Its development had begun less than 12 months before, and was to continue for several years to come, although it appears that the bulk of the development occurred during the first part of Mr. Hinkley's employment with Redrock. In November 1995 it consisted of some 12,000 lines of code. By September 1997, this had increased to over 100,000 lines, only an insignificant proportion of which remained extant from the 12,000 lines in existence 22 months before. It follows that the library was extensively developed and re-developed during the period of Mr. Hinkley's employment by Redrock. Moreover, Redrock says that this development related to the work Mr. Hinkley was performing for it. An example of this concerns what was referred to in the evidence as "the transport protocol". Mr. Spearritt in his witness statement in reply signed 14 August 2000 (Exhibit H 16) in paragraph 32 recounts a telephone conversation on 2 November 1997 with Mr. Hinkley, who was in Canada:

".... I told him that he couldn't seriously claim ownership of many parts of the core programming library on the basis that he had developed them before starting work for [Redrock]. For example, the

transport protocol was developed many months after he had commenced programming at [Redrock]. Adam reluctantly agreed that this was so and agreed to e-mail the source code for that part of the core programming library."

SPFS, as I understand it, is a customisation of the library. This means that the SPFS source code, which is relatively small in size (some 6,000 lines of code), instructs the compiler to go to the library, a considerably larger program (some 120,000 lines of code), to take a function to be converted into object code. The library has been described by Redrock witnesses as the "core programming library" or as a "subset" of SPFS or as the "foundation" or "base component" of SPFS, so integral to the operation of the SPFS application that Redrock regards it as part of the one software program. And it is clear that without the library, SPFS cannot run. Redrock says that the library was developed in conjunction not only with SPFS but also with other applications that Mr. Hinkley was employed by Redrock to write.

Mr. Hinkley says that the library is a separate program, stored in an independent directory, and that while SPFS "uses" the library to function, the library was not written for SPFS or any other Redrock program. He maintains that the library was already in existence before he commenced his employment with Redrock (albeit in a different form to that which it had assumed by the time he left Redrock's employ), that Redrock was aware of its existence because he described it in the e-mail resume sent to Redrock (see paragraph [9] above), that he demonstrated it to Redrock in his interview and that there was never any discussion about transferring the copyright in the library to Redrock. He says that when he left Redrock he left an object code version of the library together with a source code version of SPFS which was sufficient for Redrock not only to run SPFS but also to modify it as necessary. While he acknowledges that there may be an implied licence to Redrock to use an object code version of the library, he maintains that Redrock has no right to the source code to the library.

The software developed for Optus was indeed built using the class library as a tool. It was also designed to run in conjunction with the software by which the class library was itself constituted. If the library was not available, the Optus software could not operate. That software could therefore properly be regarded as dependent upon the class library software to the extent that without the latter no functions could be performed by the former. The library was, in other words, a necessary element in the functioning of the Optus software. According to Professor Zobel, an expert witness called by Redrock and whose evidence on this point I accept, the volume of code in SPFS is

low compared with that of the library. Moreover, again according to Professor Zobel, SPFS "is primarily a customisation of the library for a specific application". It is, accordingly, "critically dependent on the library", in the absence of which "the SPFS code serves no purpose". Auto X, ENS, MessageNet and SMS Monitor are also "highly dependent on the library". In all these cases "[t]he principal action of the 'main' function definition is to call a procedure 'Run', which is defined in the library, not in SPFS [or Auto X, ENS, MessageNet or SMS Monitor]": report dated 10 May 2000 by Justin Zobel and Evan Harris. I accept this evidence.

Professor Zobel was asked in cross-examination about the connection between the AW class library and SPFS. To the question "Is the SPFS source code separate from the AW source code?" he replied, in part:

"I tried to understand what the library was doing in a very general way and what SPFS was doing in a very general way, what kind of code was it? I didn't proceed very far with that analysis, but the first thing you look at, looking at code, is what is the main loop ... and what is it trying to do? Here I looked at the main loop from SMS Monitor; ... it's almost ... the same main loop. The main instruction there is the word 'run'. 'Run' is not defined in SPFS. It's defined in the library. So in terms of understanding what SPFS does, I know that it runs but I don't know any more about it. So I cannot ... say it's independent. It's stored in a separate place but the tasks [which] SPFS [does] are not defined in SPFS. They're partly defined there ... but ... whatever running involves, I have no idea from looking at SPFS. So I can't think of [SPFS and AW] as separate code in the way that one might in other cases": transcript p.980

There can be no real doubt that the software which Mr. Hinkley wrote for Redrock - the software which was in turn supplied by Redrock to its customers in discharge of the former's contractual requirements - was, in all instances relevant to this case, written so as to "run" using the class library. Thus, the class library necessarily formed a part, albeit a part in which its own identity was maintained, in a total package. Mr. Hinkley did not seriously contend otherwise. Conversely, programs such as SPFS drew upon the library as a necessary element in their ability to function. The extent to which any one program was dependent upon the library, and the precise nature of the interrelationship, was not fully explored in the evidence. For reasons upon which I will expand later in this judgment, I am nevertheless satisfied that Mr. Hinkley so designed the software he created for Redrock that the ability of that software to gain access to the library was a necessary element in its capacity to achieve those ends which Mr. Hinkley was employed to bring about.



Mr. Hinkley failed to make this position plain to Redrock. For example, Mr. Spearritt said in his evidence that he understood Mr. Hinkley to be simply working on the source code of the programs that Redrock had directed him to write; he had no clear idea that a "library" was involved in this process, or what Mr. Hinkley's position was in relation to that library. I accept this evidence. I also accept that Mr. Hinkley's failure to make it clear that he regarded the library as a distinct and independent program was not necessarily malevolent. He was doubtless too engrossed in the immediacy of his work, too absorbed in his love of computer programming, to turn his mind to other practicalities. For its part, Redrock likewise was too busy with other things, and too lacking in the relevant information, to ask the right questions. It therefore never got the right answers.

According to Mr. Spearritt, on two occasions (one in late 1996 or early 1997 and the other in August 1997) he requested Mr. Hinkley to backup all source code on Redrock's A2BNT1 UAM server. This occurred after Mr. Hinkley was unable to make a change to SPFS because he was unable to locate all the source code. In his witness statement dated 16 July 2000 (Exhibit H 16) Mr. Spearritt said:

"When a program is released to market, it is important to maintain a copy of all source code utilised in developing that program. That way, if a problem does develop in the running of the program, or if the client wants to alter the program's functionality at some future point in time, the programmer has a complete copy of source code and utilities used to create the version of the program. After the occurrence of this second incident, I told Adam that it was imperative that he kept a backed up version of each piece of production software on the A2BNT1 UAM."

Mr. Spearritt confirmed verbally with Mr. Hinkley about once a month that a complete copy of all source code was available on the server. Mr. Spearritt's own checks appear to have confirmed that source code was being saved on Redrock's server in a compressed file. This evidence demonstrates the confusion caused by Mr. Hinkley's failure properly to clarify his understanding of the status of the library notwithstanding that he was specifically directed to back up all source code in circumstances where the inability to access it had meant that changes could not be made to SPFS. Here was the perfect opportunity for Mr. Hinkley to explain to Redrock, if his position was then as he now contends, that in requiring him to back up the library or (which, as Mr. Hinkley must have realised, Redrock necessarily assumed was the same thing) to back up "each piece of production software", Redrock was requiring him to back up something copyright in which resided with Mr. Hinkley.

Mr. Hinkley relies on the existence of copyright notices which he says he placed "on almost every AW file" to argue that the directors of Redrock must have known that he was claiming ownership of the AW library. Although he asserts in his written submissions dated 4 September 2000 at paragraph 10.04 that they "must have seen these notices and had no problem with them", there is no evidence to support this contention. In particular, this proposition was not put to either Mr. Hamilton or Mr. Spearritt in cross examination. I therefore do not accept Mr. Hinkley's submission on this point.

During his time working for Redrock it appears that Mr. Hinkley was well regarded by Redrock's directors, although there were some differences of opinion about approaches to programming and occasional delays in meeting deadlines. Certainly there seems to have been no issue about trusting Mr. Hinkley to do his work for the benefit of the company. So, in August 1997 when he requested three weeks to go on a holiday to Canada with his father, Redrock was willing to acquiesce provided he first completed the project on which he was working. He was even given a \$500 cash bonus by Mr. Hamilton.

Redrock was misled. Mr. Hinkley's real intention was to complete negotiations on the terms on which he would join Hotline Communications. Only if those negotiations failed would he return to Redrock. But they did not fail. Mr. Hinkley notified Redrock of his resignation by e-mail, without prior notice, in September 1997. Subsequently it was discovered, in stages, that software written by Mr. Hinkley, specifically relating to SPFS, was missing. Mr. Hinkley had taken it with him. Moreover, and significantly, the first intimation that Mr. Hinkley would claim copyright in the library adversely to the interests of Redrock came during a conversation with Mr. Hamilton on 2 November 1997, some two months after Mr. Hinkley left Redrock and almost two years after he commenced employment with that company.

The evidence of Mr. Hamilton explains, in part, the bitterness which accompanied this litigation. During the two years that Mr. Hinkley was employed by Redrock, and in particular towards the end of 1997, the pressure on Redrock to undertake and complete assignments for its clients in a competitive environment was immense. I am satisfied that by his actions in late 1997 Mr. Hinkley placed Redrock in an extremely difficult situation. He had deprived it of software to which it had every reason to think either it or its customers were entitled. Mr. Hamilton in particular was personally embarrassed by the inability of Redrock thereby to perform as it should. Mr. Hinkley recognised the vulnerability of the company at that time, as the evidence of the telephone conversations and correspondence between him and Redrock in November 1997 demonstrates. Mr. Hinkley's sudden departure severely

hampered Redrock. In his witness statement Mr. Hamilton says:

"If Adam had told us of his intentions to leave the company, [Redrock] would have carried out a complete inventory of the software and ensured [that] Adam carry out a handover process to another programmer. However, Adam told us he was merely going on holiday, therefore the handover process was not carried out."

The relationship between the library and the software written by Mr. Hinkley for Redrock, in particular SPFS, was put to the best possible practical test following Mr. Hinkley's resignation. He was replaced in late October 1997 by Mr. Samuel Vaughan, who was then an honours student in computer engineering at the University of Melbourne with experience using CodeWarrior and who had worked for 14 months with a computer company. I accept his evidence. It was "that a large proportion of the functionality of [SPFS] must have been within the AppWarrior library". Contrary to the assertions made by Mr. Hinkley, Mr. Vaughan gave evidence that modifications were needed not only to the SPFS source code but also to the library. In his witness statement he describes making changes to the SPFS source code and successfully testing the changes on his machine "but when the application was run on some of Optus' testing machines, it crashed. I was able to reproduce this fault on one of the machines at Redrock's premises and determined that the fault lay within the AppWarrior Library." The result was that, unless he had access to the library's source code, he "would only be able to make changes to a small proportion of the SPFS application." This is despite the fact that, as Mr. Vaughan acknowledged, he at all times had access to all the source code files for SPFS. He also had access to the object code of the library. The degree of dependency by SPFS on the AppWarrior library was, however, such that none but minor modifications to SPFS could be made without access not only to the source code files of the former but also to those of the latter. Ultimately Redrock found it necessary to rebuild the SPFS application using another library. While Mr. Hinkley acknowledges that it was reasonable for Redrock to be in a position to service and modify SPFS without having to rely on him, he maintains that he left the company with everything it needed when he resigned in September 1997 - namely the source code to SPFS and an object code version of the library. He further maintains that it was not necessary for Redrock to modify the library in order to make changes to SPFS.

It seems to me that these claims are untenable. They presuppose that the library is a static program that merely needs to be called upon by the SPFS source code. However, in giving evidence in support of his contention that Redrock knew he was developing the library, Mr. Hinkley acknowledged that the library is a dynamic program which, like

all tools of this nature, inevitably needs to be continually developed and frequently updated. Mr. Paul Hinkley also gave evidence that libraries are in a "continual state of development" and there are "constant revisions" to them. If most of the functionality of the SPFS "package" lies in the library, then as a matter of logic changes will be needed to it.

Mr. Hinkley also submits that any difficulties experienced by Redrock following his resignation arose because Mr. Vaughan had not worked on either SPFS or the library and was not familiar with Mr. Hinkley's work. He points to the evidence, which I accept, that on several occasions he offered to assist Mr. Vaughan, and indeed actually went to the trouble of modifying parts of the software e-mailed to him by Redrock for that purpose. Measures such as these, Mr. Hinkley submits, ought to have overcome any problems.

I do not agree. I prefer the evidence of Professor Zobel, given in paragraph 43 of his report in reply dated 7 June 2000 (CB Vol. 5.2069 at 2077). He there states:

"The other strand of evidence is that SPFS and some of the other applications require intimate knowledge of the AppWarrior library. Software source code is written in a human-readable form that can be transformed by a process known as compilation into a form that can be understood by a computer; there are, however, many obstacles to humans readily acquiring good understanding of a program purely by reading source code. Apart from the obvious difficulty of reading a large volume of information written in an algebraic language, class and method definitions can interact in complex ways. Without knowledge of the intention of the programmer when creating software, it can be extremely difficult to grasp the full details of the behaviour of a large suite of code."

Professor Zobel then goes on to record that good software engineering practice requires the production of documentation describing the purpose of the overall library, the purpose of each class, the purpose and limitations of each method in each class, and how to use each method, in addition to detailed comments on the code itself which amplify and clarify the primary documentation. No such documentation existed for the library at the time that Mr. Hinkley left Redrock's employ. Given the pressures on Redrock at the time to service Optus, and given the rapid decline in relations between Mr. Hinkley and Mr. Hamilton culminating in an e-mail to Redrock in which Mr. Hinkley both conveyed offers to assist and threatened to put Redrock out of business, I find (accepting Professor Zobel's evidence) that Redrock was entitled to take the course it did, namely to decline Mr. Hinkley's offers and rewrite the software. I further find that Mr.

Hinkely's sudden departure and his failure to provide sufficient information to Redrock to enable it to understand the relevant software, in circumstances where he was the only person employed at that time with Macintosh technical knowledge, constitutes a breach of his contractual obligations to Redrock.

Another point should be made here. Although Mr. Hinkley considered himself the owner of the copyright in the library, at no time did he raise with Redrock the position with regard to the use of the library by Optus as an essential part of the "SPFS package". For its part, Optus of course would wish to avoid any argument about who owned portions of the software written for it by Redrock. Quite reasonably it could assume that it was purchasing SPFS (including any library files) as a functional software program. But if Mr. Hinkley's claims for copyright are correct, then every time Optus ran the SPFS "package" it was, by reproducing the library, performing one of the acts comprised in the copyright and was therefore in breach of the very copyright which Mr. Hinkley now claims. He must have known this was so. There is, it is true, no evidence that Mr. Hinkley was expressly told by Redrock that it had licensed or sold the SPFS software (including the library functions) to Optus. But I think that it was reasonable for Mr. Hinkley to infer that some licensing or other arrangement had been reached. Yet there is nothing to suggest that at any point he objected to the use by Optus of what he says he regarded as his software, or sought any recompense, or made any adverse comment, or sought to have a licence drawn up.

I turn now to the question of whether the library software was written during working hours at Redrock. This was an issue to which much time was devoted during the course of the trial. It is an important issue. It is nevertheless also important to record that the ultimate question - that concerning the ownership of copyright in the AW library - depends more on the relationship between the library and the programs written by Mr. Hinkley for Redrock than on an identification of the times during which work on the library continued.

The plaintiffs contend that, while at work, Mr. Hinkley wrote a significantly large part of the library for the purpose of developing software for use by customers of Redrock. Mr. Hinkley says the library was developed "almost entirely" outside his life as an employee of Redrock. He says he frequently worked throughout the night and on the weekends making substantial changes to the library. He relies on the fact that he used a portable hard disk to carry the library to and from work, much as a builder might carry his toolbox to work.

Redrock asked Professor Zobel and Dr. Ewan Harris, a member of the

Department of Computer Science and Software Engineering at The University of Melbourne, to determine (among other things) when the source code for Mr. Hinkley's class library was written. They concluded "that at least 90 percent of the development of the September 1997 version of the library was undertaken between 8.30 a.m. and 7.00 p.m. between December 1995 and September 1997": report of Professor Zobel and Dr. Harris dated 10 May 2000. Professor Zobel spoke to this report in the course of his evidence before me. He was, I thought, an impressive witness. In reaching their conclusions, Professor Zobel and Dr Harris performed extensive analyses of the last modification dates and times for the files comprising the AW library, SPFS, Hotline and eText. Although they concede that the last modification times and dates do not show the nature of the work performed on the files, the results suggest, when taken together, a pattern of modifications that reflects the general pattern that one would expect to see for the development of software. I am satisfied that the evidence of Professor Zobel and Dr. Harris as set out above should be accepted.

On the basis of the material available to them, Professor Zobel and Dr. Harris also concluded that SPFS was written between March 1996 and September 1997; and it appeared that the great majority of the work was done between the hours of 9.30 a.m. and 7.00 p.m. on weekdays. They could find no evidence for work on SPFS at other times. I am satisfied that there was no evidence to be found. I am also satisfied that Auto X, ENS, MessageNet, and SMS Monitor were largely if not wholly developed within the same range of times as SPFS. No claim is made by the defendants that they own the copyright in the SPFS or other Redrock software (excluding the library). However, the degree of relationship between the Redrock programs and the library is such that evidence of when Mr. Hinkley wrote the SPFS software can also be taken as evidence of when he worked on the library software.

Mr. Hinkley sought to attack the conclusions of Professor Zobel and Dr. Harris on a number of grounds. He maintained that the date and time modification information cannot be used as an indication of substantial work. Rather, it shows the "result of computer operations other than actually working on the source code". Frequently, he says, after working all night on the library and bringing the resulting work to Redrock's premises the next day, the only changes might be adjustments to restore compatibility between the library and the software he was writing for Redrock. He relied on answers to questions put to Professor Zobel during cross-examination to the effect that any change of even the smallest magnitude, such as altering a letter or a number or correcting a typographical error, would be recorded as the most recent change. However, later in his cross-examination, in response to a question from me, Professor Zobel

gave evidence, which I accept, that it was unlikely that Mr. Hinkley followed a pattern of consistently making substantial modifications overnight and then consistently making small modifications during the day. The nature of programming is such that even when making modifications to ensure compatibility, the point at which the "bug" is rectified is random, with no guarantee that it will occur during the day. In response to my question, Professor Zobel said the following: "So it's my belief that pattern of times [i.e. the pattern identified by Professor Zobel and Dr. Harris] looks a lot like - typical with things spread over many months. The last modification of some things months ago, last modification of some things yesterday. It looks as if that's absolutely typical of an ordinary working pattern where you load the file up into your editor, keep changing it till it's right and then you save it. That saves the last modification time and it's at some random point while you're working. It's not - I can't see why that would be - I can't think of any reason why they would all be during the day or 90 per cent during the day and only a small fraction at night - in fact it was only for the copyright files which are more or less certainly in a library. There's only five out of the 400 or so. I can't see why there'd be no things that he finished at night. I mean, every finish would be during the day." (T. 991)

In a further report in reply dated 13 September 2000 (Exhibit H 36), Professor Zobel states: "In point 19.4 of Mr. Hinkley's report, he states that he made minor corrections to rectify errors made late the night before. However, this is not the way programmers work; mistakes are continually discovered as the programming proceeds. For the reasons discussed in the reports of Dr. Harris and myself, if the bulk of the work was undertaken at night and only minor corrections were made during the day, then the bulk of the recorded changes would be at night." I accept this evidence. I note in this context Redrock's submission that if I accept that Mr. Hinkley worked on the library at home for the purpose of writing Hotline and eText, one would expect to find a significant number of adjustments and modifications out of hours. In my opinion, this is an inference the drawing of which is justified on the basis of the evidence.

Mr. Hinkley asserts that the last time and date modification data is unreliable because he used commercial editing tools such as BBEdit and CodeWarrior to place markers in source code. The effect was to change the last modification date and time even though the source code itself was not changed. He says that if he was using the library when working on software written for Redrock he would often place temporary markers in the library files for the purpose of cross-referencing. Mr. Hinkley also sought to rely in support of this evidence on material contained in a witness statement prepared by Dr. Michael Creek, a software programming expert who did not give evidence at trial

although his statements (dated respectively 21 February 1999 and 13 August 2000) were tendered by the defendants subject to objection. Redrock argues that this material was not put specifically to the expert witnesses in cross-examination and appeared to be something of an afterthought on Mr. Hinkley's part. In the report in reply dated 13 September 2000 (Exhibit H 36) Professor Zobel states that, like changes to code, changes to markers would typically be made at random times during a programmer's working hours. He states that he did not observe the presence of any markers in the files that he examined. Although he acknowledges that Mr. Hinkley's evidence is that these markers were temporary, he says it is surprising that they are not common in a saved version of the code. He also thought it probable that if Mr. Hinkley did use markers while writing software for Redrock, he would likewise use markers for his work on Hotline and eText which he claims he wrote at home. Professor Zobel therefore states that the evidence about markers as supplemented by the Creek material does not alter his earlier conclusions. I accept this evidence.

Evidence was also called by Mr. Hinkley from his mother, Mrs. Margaret Lehmann, and Mr. Paul Hinkley's former de facto partner, Ms. Elisha Lawry, to the effect that they each observed Mr. Adam Hinkley working on software at night and on the weekends. Neither Mrs. Lehmann nor Ms. Lawry are software programmers, although they have used computers in the course of their work. Mrs. Lehmann gave evidence that she observed Mr. Hinkley working on the computer during almost every one of the nights and on most of the weekends that he stayed with her. She could tell when he was programming from the appearance of the screen and could recognise the AW and Hotline software from the "AW" and "H" icons respectively in the top right hand corner of the screen, although she conceded in cross-examination that she could not otherwise distinguish the library from another piece of source code. Mrs. Lehmann gave evidence that she observed the "AW" icon as early as 1995. In reply, Redrock asserted that the library was not named "AW" until early 1997 and therefore Mrs. Lehmann could not have made the observation she claimed; but in my opinion the evidence does not support this submission. Mr. Paul Hinkley, indeed, swore that the library was called "AppWarrior" from as early as June 1995. He says his son thought of this name, but Mr. Paul Hinkley disagreed with the use of it because it was similar to the name CodeWarrior; the compromise reached was that it would be referred to in the written licence agreement simply as "Adam's App Builder" (T. 2486, 2516). I accept Mr. Hinkley on these points.

Ms. Lawry gave evidence that she observed Mr. Hinkley spending a minimum of 12 to 18 hours a day working with the computers at Mr. Paul Hinkley's home/office, and estimated that he spent between 2,500 to



3,000 hours between 1994 and September 1997 developing his software, although some of this time was spent writing eText. She also said that she would be able to recognise source code files on screen. She could tell when Mr. Hinkley was working on AW library files because the name "AppWarrior" appeared on screen; and Mr. Hinkley told her that this was what he working on.

Although I accept that both Mrs. Lehmann and Ms. Lawry were honest witnesses, I find that their evidence is of limited value. Mrs. Lehmann conceded that she had little direct knowledge of what Mr. Hinkley was doing on the computer; for a large part of the time she relied on what he told her. Ms. Lawry also conceded that she did not see what file Adam Hinkley was working on every time she observed him at the computer, and she did not stand over him watching everything that he did. There is little here, then, to cause one to question the reliability of Professor Zobel and Dr. Harris.

I have little doubt that Mr. Hinkley spent some time, outside the hours of his employment, working on the class library as well as on Hotline and eText. I nevertheless find that something in the order of 90% of the development of the AppWarrior library occurred during ordinary business hours and while Mr. Hinkley was physically present at the Redrock premises. Much of this time was used in refining AW to operate more effectively with software which Mr. Hinkley was writing for Redrock; but, the library being a tool of general application, this work would have assisted, directly or indirectly, the development of the Hotline and eText software as well. This of itself, being a natural concomitant of work that directly benefited Redrock, could not have been the ground of any complaint by that company as Mr. Hinkley's employer. On the other hand, neither could it found any viable claim by Mr. Hinkley to copyright in anything.

Mr. Hinkley submits that the fact that he owned an external hard disk which he used to transport the library to and from Redrock's premises shows that he wrote the library software at home. It is ridiculous, he says, for Redrock to assert (see the particulars under paragraph 6 of the Further Amended Statement of Claim) that he used the hard disk to work on Redrock software at home on his own time since he was working at Redrock's premises full time. Mr. Spearritt gave evidence that he believed Mr. Hinkley used the hard disk to back up Redrock's work on his home computer for safekeeping. He confirmed, however, that he did not think Mr. Hinkley worked on SPFS at home save for a few occasions - anywhere between three to 10 days - during a train strike. The evidence about the hard disk is inconclusive: while it is consistent with Mr. Hinkley writing the library software at home, it is equally consistent with his writing it at work before taking the disk home to use for his own purposes.

Mr. Hinkley sought to rely on a number of "conversations", referred to by him as "chat conversations", which he had in the first half of 1997 with certain Canadians, in particular a young man named Jason Roks. Mr. Hinkley was, later in that year, to join with Mr. Roks and others in Canada to form Hotline Communications as the vehicle through which to exploit Mr. Hinkley's work in creating and subsequently refining the Hotline software. In the first half of 1997, the plans for the commercial development of Hotline were frequently discussed by means of the Internet. By this means the planners were enabled to communicate with each other not orally as in true conversations but by keyboard-generated messages received simultaneously by all participants, and to which an immediate (keyboard-generated) response was possible. A transcript of many if not all of these messages has been preserved. It was on these transcripts, or some parts of them, that, at various points in the trial, all parties relied, with objection being taken to particular portions from time to time.

The chat transcripts fall far short of proving that the AppWarrior library was the product, either exclusively or in large part, of work done by Mr. Hinkley at home. As an example of Mr. Hinkley's misplaced reliance, I reproduce a portion of the transcript of a chat held on 7 May 1997 (page 26 of 27). In my opinion, it does not assist Mr. Hinkley's case. He is noted as "hinks". The symbol " :)", often seen on the transcripts, is used to convey a smile. Terry is Mr. Terence Gregory, a Canadian and one of the Hotline Communications plaintiffs. The transcript is reproduced substantially as it appears: "\*\*\*\* Terry wonders if hinks ever sleeps

Terry: :)

Hinks: never!

Terry: or rather, if you ever do any work for your work :) (job)

Hinks: I've put in provision for all sorts of complex effects (I made sure provision for everything GX does :)

Terry: oooh

hinks: well, b/c of AppWarrior, I get my work for work done really quickly ya know MessageNet? I wrote that in the 3 days before it was due :)

Terry: heh

hinks: started and finished in 3 days

Terry: nice

hinks: 'yeah those tabs took me hours to do'

Terry: hehehe

hinks: 'the modem stuff was really tricky too'

Terry: muhahaha

hinks: 'also I devoted several days to really stress test the app to remove all the bugs'

Terry: heh

hinks: no bugs, AppWarrior just works :)"

Little if any reliable evidence can be found in casual conversations of this kind. Indeed, the evidence of the transcripts hardly mounts any challenge to that of the plaintiffs about the times on which work was done on the library.

For all these reasons, I conclude that, on the balance of probabilities, a very significant proportion of the AW software was written by Mr. Hinkley for work-related purposes and during work hours. I also conclude that all the Redrock software written by Mr. Hinkley was written during the course of his employment and (with the possible exception of work done at home during transport strikes or other irregular and infrequent circumstances) during work hours. My additional finding that SPFS and other Redrock programs were dependent for their operational capacity upon the AW software leads me to the further conclusion that Redrock was the owner of the copyright in the AW library when Mr. Hinkley, without any warning, left that company's employ in September 1997. During the period of his employment, moreover, the library had been transformed. The copyright which subsisted in November 1995 subsisted in the library as it then was. By September 1997, it was no longer that library. What little original material then remained had been absorbed into a much larger entity capable of performing altogether different tasks. The literary work of September 1997 was a new literary work, made by Adam Hinkley "in pursuance of the terms of his ... employment ... under a contract of service": Copyright Act, s.35(6).

I turn next to deal with a further point: Redrock's claim to an interest in the Hotline software. Although, given the settlement between Redrock and Hotline Communications, this claim has greatly

reduced significance, it nevertheless demands some attention.

While it concedes that Mr. Hinkley wrote a large proportion of the software at home, Redrock submits that there is also evidence that he used Redrock's resources to develop Hotline. Moreover, it argues that, as with SPFS, the relationship between the library and the Hotline software is such that a large portion of the latter's functionality lies in the library source code, which Redrock owns. The two are so interdependent that it is not possible to separate them, and therefore the whole is held by Mr. Hinkley on trust for Redrock. A claim is also brought for compensation for the use of Redrock's Internet servers by Mr. Hinkley in marketing and selling the Hotline software without Redrock's consent, knowledge, or approval. At trial, not only was it said that Mr. Hinkley used the Redrock Internet servers to sell Hotline, but also that he used those servers to covertly facilitate the operation of Hotline, by including the Redrock servers in a list of servers that a purchaser of the Hotline software could use, presumably to connect to other clients in order to chat and perform other functions.

Mr. Hinkley denies these claims. He says that Hotline was his own project. It was developed quite independently of his work for Redrock and (as Redrock accepts) was carried out without any direction from his employer and without its knowledge. Although he concedes that he worked on Hotline at work on some 10 to 20 occasions, each of about three hours duration, he did not regard these as significant. They equate to no more than approximately 1.05% of his time at Redrock: paragraph 18 of his witness statement dated 7 August 2000. He says any such work was done when he did not have any specific tasks to perform for Redrock; he therefore did not think it would cause any harm. He did not use Redrock's Internet servers to sell Hotline; rather, he called upon his own rights of access to the Internet, a fact acknowledged in the witness statement of Mr. Terence Gregory. I accept this evidence. I also note Mr. Hinkley's point that it would be an easy matter for Redrock to produce Internet logs to show precisely how their equipment was being used. No such logs were tendered at trial, although Redrock did not suggest that they were unavailable.

Professor Zobel and Dr. Harris were asked by Redrock to examine the Hotline software to ascertain when it was written. In paragraph 5.11 of their report dated 10 May 2000 they said:

"Figures 6 and 7 show the results of the same kind of analysis for the Hotline code in H dumps. There are only 29 data points of this code (and only 24 distinct times), because it consists of a small number of large files. Of these, 18 of the 24 distinct times are between 10 a.m.

and 7 p.m. on weekdays. This is not sufficient evidence to show that Hotline was substantially developed during this time period. However, there is no evidence to show that Hotline was substantially developed outside this time period."Later in their report they conclude that while the evidence strongly suggests that Hotline was worked on during working hours, "there is not enough data to determine when the majority of the code was developed." They also conclude that Hotline was probably initiated in September 1996. They found that Hotline, like SPFS, is critically dependent on the library, although it seems the Hotline software is considerably larger in size than SPFS and the other Redrock applications.

Both Redrock and Mr. Hinkley sought to rely on material contained in a number of the chat transcripts. So, in a chat on 9 June 1997 (Exhibit AH 8) Mr. Hinkley was asked by one of the participants, a person known only as "Phil", what he "does for a job". He replied that he "programs communications type applications mostly for [Redrock]". Phil then said: "And they allow you to work on [Hotline] at work? ... On THEIR time? With THEIR equipment?... Why do they allow this???"(capitals and punctuation as in the original). Mr. Hinkley replied: "Phil - no I don't really do much [Hotline] stuff at work. However, a lot of my stuff for work OVERLAPS with [Hotline] shhhh :)" (again capitals - and the use of symbols - as in the original). Mr. Hinkley relies on this part of the chat transcript to show he did not perform Hotline work at Redrock's premises, and points in support to the smiling face symbol with which the passage concludes; while Redrock submits that in it Mr. Hinkley concedes that there is an overlap between his work on Hotline and his work for Redrock.

I should record here that the document which is Exhibit AH 8 comprises only pages 12 and 13 of this chat transcript. The remainder of the chat, which was opened by Mr. Colbran Q.C. on behalf of Redrock, was not thereafter tendered - either formally, or as part of a procedure, proposed by Mr. Wilson Q.C. and agreed upon by the parties, to admit as evidence documents which were (a) referred to in opening and to which no objection was successfully taken, and (b) collected together in a folder prepared on behalf of the plaintiffs. Notwithstanding this omission, Redrock relies on an earlier part of the 9 June 1997 chat transcript.

The point was not taken at the trial that this portion of the transcript had not been received into evidence. I am, however, prepared to accord it that status given that tender of another portion (Exhibit AH 8) would by itself present an inaccurate and indeed unfair picture.

Redrock seeks to persuade me that the relevant (untendered) portion of

the chat transcript of 9 June 1997 records Mr. Hinkley informing his Canadian associates, perhaps for the first time, that he has been asked by his employer to work with a PC. This apparently caused some consternation among the Canadians because it put in doubt his capacity (given the changed requirements of his employer) to effect what it seems had been agreed, namely that a Macintosh version of Hotline would be released before a Windows (or PC) version.

This portion of the chat is perhaps worthy of reproduction, not only to assist in the evaluation of Redrock's submission, but also because it conveys something of the flavour of the "chats" in which Mr. Hinkley indulged. Again, Mr. Hinkley is noted as "hinks". The other names and nicknames belong to the several Canadian conversationalists. The transcript is reproduced substantially as it appears:  
"hinks: you might see a PC version before b22 [the Macintosh version] b/c I have to work on PC for work

Phil: NOOOOOOOOOOOOOOOO!!!!!!!!!!!!!!!!!!!!!!!!!!!!

Terry: heh

'ukka: adam??

Terry: pc=good

'ukka: adam'

Phil: NOT FOR US @ !!!!

'ukka: I need a final version mac version

David M: Hmm.

David B: yeah, but all of our forecasts are based on Mac 1st, PC second; there is a bigg diff in costs!!

'ukka: adam????

hinks: I'm still working on it, but I have to produce PC stuff for work now

Alex: Wow

'ukka: ya but what

David B: why are you telling us this now?

Phil: and you have a mac at home DAMN IT!

'ukka: five

hinks: b/c it just happened I only got the PC last week (I omit some lines)

David B: adam, once we get this money then, you have got to get over here as soon as you can!! And devote yourself fulltime

David M: 151%

hinks: well we haven't yet, and in the meantime, I have to do PC stuff for work, which means PC hotline

'ukka: adam??

Phil: hinks, do mac version AT HOME

hinks: I will, as much as I can.... (I omit some lines)

David B: so what are we talking about in terms of time lines adam?

hinks: DB - hard to say, I haven't programmed PC before."

Later, Mr. Hinkley said: "I wasn't warned either - the first thing I knew about it was there was a PC on my desk when I got to work in the morning."

In opening, Redrock submitted that if it was the fact that the Hotline software was written out of work hours, as Mr. Hinkley contends, it would not matter that he was asked to write Windows programs at work. Mr. Hinkley's decision not only to begin work on a PC version of Hotline, but also to suspend his work on the Macintosh version, is (according to Redrock) directly related to the fact that he was given a PC at work by his employer. If it was the case that he worked on Hotline at home on his Macintosh computer it would not matter that he was directed to use a PC by Redrock at work. (I note in this context that Mr. Paul Hinkley contends in his witness statement dated 27 June 2000 (Exhibit PH 12) that by 1993 Meta Consultants had commenced design and programming of the first version of eText for Mac and Windows, although he does not state that his son was performing Windows programming. In her witness statement Ms. Lawry contends that by 1995 Meta Consultants had acquired a Windows computer and Mr. Hinkley had started work on a PC version of the library with his father. Mr. Hinkley, however, appears to contradict this statement when he says he had not "programmed PC before".)

The portion of the 9 June 1997 chat transcript quoted above appears to confirm that Mr. Hinkley was at least contemplating writing part of the PC version of Hotline using Redrock's equipment; and the tenor of the remarks appears to imply that he had used Redrock's resources in the past to write the Macintosh version. However, this evidence does not go far enough to satisfy me on the balance of probabilities that Mr. Hinkley wrote so much of the Hotline software at work and in pursuance of his contract of employment (or in circumstances giving rise to a constructive or other trust) that it can be said that the Hotline software vests in Redrock. Nor is this conclusion affected by the circumstance that Redrock owns the library, and that the Hotline software is dependent on that library. The position is not analogous to that relating to the dependency between SPFS and AW. In my opinion, Mr. Hinkley was in September 1997 the owner of the copyright in the Hotline software. This conclusion is not, as a matter of law, inconsistent with my conclusion that at the same time Redrock was the owner of the copyright in the library. As a matter of practicality, however, it might give rise to problems. If Hotline depends upon the library, and if copyright in the latter is not owned by the person holding copyright in Hotline, then the owners of Hotline may not be able to make use of it. I return briefly to this issue in paragraph [78] below.

Mr. Hinkley undoubtedly occupied a fiduciary position in relation to Redrock. In my opinion, however, he breached no fiduciary duty in relation either to AW or Hotline. His work on the former certainly advanced his work on the latter; but this did not materially interfere with the fulfilment of his duties to Redrock. I am satisfied that, had his employer known the facts, it would not have sought to prevent Mr. Hinkley utilising AW for his private purposes so long as this could have been done without adversely affecting Redrock's interests. An accommodation to that effect could, and I think would, have been worked out had Mr Hinkley been entirely open about his interest in AW. In these circumstances, it seems to me that Redrock would be unjustly enriched were it successfully to claim in this case relief of the kind equity might otherwise allow. It should also be borne in mind that a computer program which falls into the category of a "library" is a very different creature to other assets; and the applicable principles of equity must of course make appropriate recognition of the difference.

In his written submissions Mr. Hinkley addressed an issue which he says was raised by Redrock: namely, that Hotline was a derivative of SPFS because they both use TCP/IP and client/server architecture. It seems to me that Mr. Hinkley has misconstrued the point of this evidence: the point being made by Redrock is not that the Hotline



software can be said to be derived from SPFS, but rather that Redrock's business was not necessarily so dissimilar to the purpose of the Hotline software that it can be said that Mr. Hinkley's work on it fell outside the terms of his employment. Clearly SPFS and Hotline do different things. But it is not inconceivable that Redrock, being in the business of developing software for, among other things, use across wide area networks including the Internet, may have contemplated at some stage developing a product like Hotline. However, this point was not developed during trial and appears to be inconsistent with evidence given by Mr. Hamilton when, after Mr. Vaughan showed him the Hotline web site, he first learned of the existence of the Hotline software:

"But at that point of time I was of the belief that if Adam had written that, that's fair enough, it wasn't a real big issue for me, but I was most concerned about the fact that he'd taken the software that he's developed for us which is - it's all the library that allowed our application to work." (T. 1532) I accept that Hotline is not derived from SPFS. I also accept that Hotline is not a program in which Redrock was relevantly interested.

Hotline Communications contends that, in this case, that is not a circumstance which gives rise to the difficulty postulated in paragraph [ 75] above. Whatever the true position in September 1997, a period in respect of which both Redrock and Mr. Hinkley once asserted copyright in each of Hotline and the AW library, Hotline Communications is now the holder of copyright in both. This position was reached, Hotline Communications submits, either when Mr. Hinkley assigned the relevant copyright to Hotline Communications or when Redrock and Hotline Communications settled their differences over that copyright. According to Hotline Communications, the question of the ownership of the copyright before September 1997 is therefore irrelevant. Once settlement had been effected, each of the former claimants had ceded their claim to the Canadian company.

Before dealing with this question, I turn to the issue of whether Mr. Hinkley misused Redrock's Internet servers to market or sell the Hotline software. In my opinion, the evidence on this point is unsatisfactory. The evidence adduced by Redrock was that on examining a copy of the Hotline software seized from Mr. Hinkley during the Anton Piller raid, it discovered a reference to the Redrock TCP/IP address in a "Read Me" file contained in the Hotline software. The "Read Me" file, when opened, contains the following notation:

"Hotline 1.1b21 supports URL's [Uniform Resource Locator or Universal Resource Locator] via Internet Config. That means if you have Internet Config installed, you can command-click on an URL and the

appropriate application will open up.

You can also configure Internet Config to recognize Hotline URL's, for example <hotline://203.21.125.42/>. To configure, open Internet Config, click on Helpers, then Add, enter 'hotline', then click 'Choose Helper' and select the Hotline client application."

I accept the evidence of Mr. Hamilton that the number quoted above is a Redrock TCP/IP address. It seems to me, however, that this evidence does not necessarily demonstrate that Mr. Hinkley was using the Redrock servers to market or sell the Hotline software. I accept Mr. Hinkley's evidence that the reference to the Redrock TCP/IP address in the 'Read Me' file was only an example to demonstrate, once a user has the Hotline software, how he or she might customise their computer to use the Hotline software. Further, Mr. Hinkley gave evidence, which I accept, that he had his own web site through which he marketed and sold the Hotline software.

The evidence as to Mr. Hinkley's use of Redrock's servers to run the Hotline software is another matter, however. Upon opening the Hotline software, Redrock discovered an icon "Servers" (Exhibit R 4). When the "Servers" file was opened, it listed 10 servers, one of which was called "Hotline Demo Server". That file in turn, when opened, gave the TCP/IP address "203.21.125.42" which is one of Redrock's TCP/IP addresses. After explaining that "chats" occur not by one computer talking directly to another computer but via an intermediary server, Mr. Hamilton gave the following evidence on this point:

"... What I would expect is that when somebody had first downloaded the Hotline software and loaded it onto their machine, the course of least resistance is usually taken and if there's a button there that says, 'Connect to the demo server', that's generally what people would connect first. But from my experience of the Hotline software, then you go and search for other servers and people will follow their nose after that. I suspect there was probably a lot of people connected to that demo server just because it was called 'demo server'. I might be wrong, but that's what I would presume and it may actually explain our Internet usage going through the roof for a period of time." (T. 1530)

Mr. Spearritt in his witness statements gave evidence that he raised the issue of dramatically increased Internet usage with Redrock's staff, including Mr. Hinkley, at a meeting some time after May 1997. He noticed that Mr. Hinkley's computer was running a server program. Two weeks after raising the matter, he checked Mr. Hinkley's computer to find the server still running but with a message stating "This server is closed due to excessive bandwidth complaints by the Network

Administrator". He states: "This suggests to me that, because I had made enquiries of Adam about [Redrock's] Internet usage increasing, Adam Hinkley had decided to tell Hotline users accessing his server that it was closed. It also suggests to me that prior to posting this message on his server, Adam was running a Hotline server software program on his Macintosh computer whilst at work." After this time Redrock's Internet usage returned to normal.

Mr. Hinkley admits that he did run the Hotline software on Redrock's servers on some occasions (T. 2111 and 2113). I note that the allegation brought by Redrock in paragraph 13 of its Further Amended Statement of Claim dated 26 July 2000 refers only to the use of the Internet servers "in the marketing and selling" of the software and not to "run" the software. However, subject to the pleading being appropriately amended, I find that Mr. Hinkley did misuse the Redrock Internet servers.

The calendar year 1997 must have been, for Adam Hinkley, no less full than any other in a young life during which much had already been achieved. He had become an important cog in the Redrock wheel. He was also heavily involved with all facets of the AW Library. Most important of all, perhaps, was a growing ambition to exploit, through the Hotline software, his very considerable gifts as a computer programmer. This ambition had been fed by contacts which he had made (and to which I have already referred) with a group of like-minded Canadians of his own generation: young, enthusiastic, and keenly aware of the potential importance of their work in the field of intellectual property. The three most significant of these were Mr. David Bordin, Mr. Terry Gregory and Mr. Jason Roks. One can readily empathise with, indeed applaud, their excitement and enthusiasm as they contemplated a future in which they would play a significant part. They were joined by two older men, Mr. Austin Page and Mr. Bachir Rabbat, who had a greater breadth of knowledge in matters of commerce than their younger colleagues. This, it was anticipated, would give rise to a nice blend of youth and experience. That future could not be realised without the raising of capital. Only then could the full commercial potential of the Hotline software be realised. Canada was the chosen field. The plan was to incorporate, or to acquire, a Canadian company which would serve as the vehicle through which Hotline's potential could be realised.

It is unfortunately typical of Mr. Hinkley that, in his witness statement of 16 July 2000, he asserts that the "registration of the first plaintiff was done without my agreement and I was not even informed that it was being done." Even if this were true, and I am satisfied that it is not, it is a carping criticism. In fact the incorporation of a company such as Hotline Communications was a

necessary step if the potential of the Hotline software was to be realised. That incorporation was effected by Mr. Bordin on 15 July 1997. He says that it was done "with the agreement of Mr. Hinkley": witness statement of David Bordin dated 21 June 2000. I accept that this was so. In any event, (as was inevitable) Mr. Hinkley agreed in the end to throw in his lot with the newly formed company. In return for a majority of its shares, he would assign to it his interest, or at least a part of that interest, in both Hotline and AW.

The defendants' position is that only part was assigned. Hotline Communications plead assignment of the whole. But before those positions can be compared, I must deal with an objection which goes to the circumstances under which the agreement was made.

That it was made is not in dispute. It is in writing, and is dated 17 September 1997. The relevant document is entitled "Shareholders' Agreement". The parties to it were Hotline Communications (referred to in the Agreement as "The Corporation"), Adam Hinkley and his Canadian associates. Of these, all but Bachir Rabbat joined as individuals. Mr. Rabbat's interests were represented by a company called 1251267 Ontario Ltd.

When he arrived in Canada in September 1997, Mr. Hinkley knew that the capital then available to Hotline Communications was insufficient for more than its short term needs. Only \$50,000 had been invested to that time. All of this came from Messrs. Page and Rabbat, and Mr. Rabbat's brother, Bassel Rabbat. None of it came from Mr. Hinkley. He alleges (and it is not in dispute) that he and his colleagues were looking to raise a further \$500,000 as quickly as possible. It is in this context, according to Mr. Hinkley, that he was induced to enter into the Agreement by a representation made to him by Messrs. Page and Rabbat on the day the Agreement was signed.

There has been much inconsistency in the defendants' account both of the circumstances in which the representation was made, and its terms. In the version currently advanced by them, Mr. Page told them that \$500,000 had been raised as capital for the company; and that, in Mr. Page's words, "All you [Adam Hinkley] have to do is to sign the agreement, and then Bachir and I will invest the \$500,000." They believed him. Induced by that representation, Adam Hinkley agreed to become a party to the Shareholders' Agreement. But the representation was false - neither \$500,000 nor any like sum had been raised. Messrs. Page and Rabbat knew this. The representation was therefore fraudulent.

The representation as set out above appears (in substance) in Adam Hinkley's witness statement of 16 July 2000, filed in reply to that of

David Bordin of 21 June 2000. It is reproduced, in precisely the form shown in paragraph [90], in his witness statement of 7 August 2000, and in his written submission dated 11 September 2000. I therefore proceed upon the basis that it accurately reflects the words upon which Mr. Hinkley now relies. In a pleading signed by counsel, however, two representations are put forward: see the Further Amended Defence dated 23 October 1998, at paragraph 25. Moreover, the first of the two representations there pleaded would have it that the sum of \$500,000 was to be provided not from Messrs. Page and Rabbat, but "through a third party investor". I set out below the relevant paragraph, in full:

"25. In order to induce Adam Hinkley to make and complete the Shareholders' Agreement, the plaintiffs represented ('the representations') to Adam Hinkley and Paul Hinkley that:

(a) Austin Page was arranging through a third party investor for funds, in the sum of \$500,000, to be invested into the first plaintiff and those funds would be forthcoming upon Adam Hinkley's execution of the Shareholders' Agreement;

(b) Unless the said intellectual property was assigned to the first plaintiff and the first plaintiff could guarantee the technology, that venture capital funding would not be possible without such assignment.

#### Particulars

The representations were made by Austin Page on about 17 September 1997, at the meeting between the plaintiffs and the first and second defendants, in Toronto, Canada, in the course of negotiations prior to the execution of the Shareholders' Agreement. The second, third, fourth and fifth plaintiffs were present throughout the course of those negotiations, and the representations were made by Austin Page."

During the course of the trial, the defendants sought to expand their attack by reliance upon statements allegedly made by persons other than Messrs. Page and Rabbat. These statements were said to be to the same general effect as those set out in paragraphs [90] and [91]. In my opinion, I should disregard all of them. They were not pleaded. Their precise content was never clear. And they cannot on any view bind Hotline Communications. Indeed, they cannot even relevantly bind those who are said to have made them: none amounted to an assertion, put forward in circumstances such that the defendants could rely upon it, to the effect that \$500,000 had been committed to Hotline Communications, and would be available for investment upon the signing of the Shareholders' Agreement.

In whatever form the representation is put forward, it cannot be substantiated. Even if it could, it could not assist Mr. Hinkley in his defence of the claims by Hotline Communications against him unless the representation was made on behalf of the company. When it was made, however, neither Mr. Page nor Mr. Rabbat represented the company for any relevant purpose. I am satisfied that neither Mr. Page nor Mr. Rabbat had any authorisation from the company to speak on its behalf on this subject. Mr. Hinkley, it is true, gave evidence that, when the representations were made, nobody else present sought to contradict what Mr. Page and Mr. Rabbat had said. Some or all of those others were members of the Hotline Communications board. There is no evidence, however, of any arrangement between them pursuant to which Mr. Hinkley was to be given the information about which he complains. I therefore find that, if Messrs. Page and Rabbat spoke to Mr. Hinkley in the terms alleged by him, they did so on their own behalf, not on behalf of the company. The silence of the other Canadians present does not in my opinion amount to an endorsement by the company of anything said by either Mr. Page or Mr. Rabbat. On Mr. Hinkley's present version, after all, Mr. Page and Mr. Rabbat were said to be speaking of an investment which they would make themselves.

In any event, I am satisfied that no representation with the characteristics alleged by Mr. Hinkley was made. His evidence, and that of his father, was on this topic thoroughly unsatisfactory. This may in part be explicable on the basis that both father and son appear to have a flawed understanding of the process of raising capital through corporate structures, as demonstrated by the following excerpt from Mr. Adam Hinkley's written submission of 11 September 2000:

"1.19 According to the ... Shareholders' Agreement ..., I assigned my Hotline and AW intellectual property to the company in return for \$1 and 52.7% of the shares of the company, and \$50,000 was invested into the company.

1.20 It should be noted that I was not receiving shares in the company, rather I already owned all of the Hotline company/business, and I was giving up a percentage of it. Prior to the Shareholders' Agreement, I owned 100% of the Hotline and AW software, and I owned 100% of my 'software' registered business ... Thus receiving shares in Hotline communications ... was not a benefit to me, rather it was an acknowledgment of what I already owned - my Hotline software and business.

1.21 This means that I gave up 47.2% of my business in return for only \$50,000 being invested into the company. It is inconceivable that I would have agreed to give up so much - nearly half of my valuable intellectual property and business - in return for such a

small investment. If you weigh up the value of what I was selling versus the consideration received, any reasonable person would describe it as a grossly unfair deal. My point here is that I must have been intelligent enough to see that. So why on earth did I agree to it? The answer is that there was and MUST have been more to the deal.

1.22 And that is where the \$500,000 comes in. The promise of the availability of \$500,000 for a prompt investment is the critical factor that explains why I signed the Shareholders' Agreement and in doing so gave up about half my Hotline business.

1.23 The Shareholders' Agreement provided for 1,200,000 shares in total. The October resolution authorising the 500,000 shares ... brings the total number of shares to 1,700,000. According to page 1 of the Shareholders' Agreement ... I had 633,111 shares. This is 37.2% of a total of 1,700,000 shares. There were also options issued to me ... but ... I would have been required to pay ... \$460,444 in order to acquire those shares.

1.24 Austin Page and Bashir Rabbat claim that the deal was that they would ATTEMPT to raise \$500,000, not that they actually had it ready to invest. If this is to be believed, then the negotiations went something like this: 'Adam, we want you to give up 62% of your company, and we want you to assign your valuable intellectual properties of the company, and we want you to come to Toronto to work for the company, and in return we will ATTEMPT to find \$500,000.'

1.25 And in reply, the plaintiffs would have you believe that I said: 'Sure, that sounds like a fantastic deal, I will agree to tie up my intellectual property with you guys, as well as giving you more than half of it, and I'll cross my fingers for good luck and hope that you can find some people with a spare \$500,000.'

1.26 I think that during this trial, I have demonstrated that I am not stupid. I may have been gullible, but I was not stupid. It is totally improbable that I would have agreed to such an unfair and uncertain deal."

Mr. Hinkley then proceeded to draw an analogy between his position and that of a vendor of a house who transfers ownership of it on the faith of the purchasers' promise to attempt to find the purchase price. The analogy is not apt.

Mr. Hinkley had, or thought he had, the rights to Hotline, a potentially valuable software program. He wanted to exploit those rights. He could not do so, however, without money. His own

financial resources were inadequate. In order to make good the deficiency, he had to offer something in return. All he had to offer was his software; he did not have a 'company', and any 'business' which he might then have begun remained in its most formative stages. He found a number of Canadians who, in return for a transfer of the rights in the software to an entity in which they held (or were in the future to hold) an interest, were prepared to join with him in forming a company in which he would be, at least initially, the majority shareholder. They would together hold less than half the total share capital. This reflected the fact that it was Mr. Hinkley, not the Canadians, who supplied the very asset for the exploitation of which the company was brought into existence. In the initial allocation of 1,200,000 shares Mr. Hinkley therefore received 633,111. The balance of 566,889 shares was divided between Jason Roks (286,402), David Bordin (105,519), Terry Gregory (74,968), Austin Page (50,000) and 1251267 Ontario Ltd. (50,000).

The division in this way of the 1,200,000 shares which represented the then issued capital of Hotline Communications could not have been the result of a precise calculation of the shareholding equivalent of the value of each shareholder's contribution to the company. It was doubtless the result of a bargain between the shareholders (indeed, this is the evidence - which I accept - of David Bordin). Whether it was or not, the inherent nature of the transaction suggests that Adam Hinkley bound himself to accept his shares, and the potential wealth they represented, in return for his Hotline software. If that software proved to be as marketable as Mr. Hinkley anticipated, then the shareholders would receive handsome dividends and the value of their shareholdings would increase proportionally. The ultimate benefits sought from the assignment would be realised. Mr. Hinkley (and his colleagues) would become rich.

It follows that he did not assign his interest in Hotline before he received that which by the arrangements he had already settled with his Canadian colleagues he was due to receive in return. By 17 September 1997 Mr. Hinkley already had his 633,111 shares. Nor did he "give up 62% of [his] company". He never had a company to give up; he merely had software to assign. Still less did he or anybody else "give up" anything before the \$500,000 was received in return. Nothing was or would be "given up" before the \$500,000 was to hand. As and when it was committed, Hotline Communications would "give up" (i.e. allocate) shares to the contributors in proportion to their contribution. If the "attempt" about which Mr. Hinkley speaks did not succeed, no additional allocation would take place.

The other side of the ledger is that Mr. Hinkley could not market his software without capital. Mr. Hinkley did not have that capital. It



had to come from others. Those others were not going to give it away. They would require shares in Hotline Communications in return. Those shares, however, would not entice the potential investors to invest unless they were backed by the software. Hence the need for an assignment of Hotline from Mr. Hinkley to the company. It is likely that investors in general would have demanded nothing less than shares which carried with them that asset backing: by investing a large amount of money in a new company, with a new product, they were assuming a risk. Without the asset, the risk/benefit ratio would probably have been such that the capital would not have been raised. The future of Mr. Hinkley's Hotline software would in those circumstances have been bleak.

In short, Mr. Hinkley was not necessarily being generous in (to use his words) "giving up so much". He did what had to be done if his hopes for the product which he had created were to be realised.

Mr. Page and Mr. Rabbat both deny the making of the alleged representation. I accept those denials. In doing so, I have had regard to all the relevant evidence including:

(a) The fact that nothing Mr. Hinkley did after the Shareholders' Agreement was executed is consistent with a case that the representation was made and was relied upon by him. He says that, at a date some weeks after the signing of the Shareholders' Agreement, he spoke to Mr. Rabbat about the fact that \$500,000 had not been subscribed. But he also concedes that, when told that the money was in the process of being raised he was content to allow the matter to rest.

(b) The total lack, in all the correspondence between Mr. Hinkley, his father and Hotline Communications, both before and in the months immediately after Adam's return from Canada to Australia, of any complaint arising from any allegation that the representation was made. This is in itself extraordinary. It is the more so since whenever it suited him after this litigation began, Mr. Hinkley put forward the representation (and its falsity) as the reason for his departure from Canada (see, for example, his reply dated 16 July 2000 to Mr. Bordin's witness statement).

(c) The joinder by Mr. Hinkley in a resolution passed on 21 October 1997 authorising the raising of \$500,000 from unspecified private investors over an unspecified period.

(d) The joinder by Mr. Hinkley on 23 August 1997 (the relevant document being re-signed by him on 10 September 1997) in an agreement known as the "Agreement in Principle" in which reference is made to

(i) the issue to Messrs. Page and Rabbat of 50,000 shares at 50 cents each (an acknowledgment of their contribution of \$50,000); (ii) a second share issue intended to raise, in the future, the sum of \$500,000 from private investors; and (iii) options to Messrs. Page and Rabbat to acquire a further total of 300,000 shares at 50 cents each.

Other considerations also bear upon this question:

(a) People do not usually tell lies if they know that their mendacity will at once be revealed. Yet, if he did make the representation, Mr. Page must have known that its falsity would become apparent immediately the promised "investment" was not forthcoming according to its terms; and that was, according to Mr. Hinkley, to be upon the signing of the Shareholders' Agreement - an event intended to take place on the very day that the representation was made. And if it was made, Mr. Hinkley ought immediately to have wondered what it was that Messrs. Page and Rabbat would receive for their \$500,000. It could not be the Hotline software, because Hotline Communications owned (or by then would own) the rights to that. It could only have been shares in the company - the usual quid pro quo for an investment of that kind. Mr. Hinkley appears to have appreciated this. On the other hand, there is no evidence of any consideration being given to how the change in the proportion of shares held by the various shareholders was otherwise to affect their relationship, including Mr. Hinkley's position as majority shareholder. The prospect that his shareholding might be diluted pursuant to a different capital-raising proposal was later to cause Mr. Hinkley grave concern.

(b) The defendants allege that the representation was an inducement, if not the most important inducement, behind their entry into the Shareholders' Agreement. In these circumstances, it is extraordinary that, on the evidence, it is not possible to say whether or not Mr. Hinkley and his father were taken by surprise by Mr. Page's pronouncement. Did they come all the way to Canada in the expectation that someone would say what Mr. Page is alleged to have said? If so, then one would anticipate carefully drawn clauses of the Shareholders' Agreement to deal with its consequences. No such clauses exist. If, on the other hand, the representation was unexpected, there is no evidence about the reaction of Mr. Hinkley and his father to this new turn of events - except that, according to the defendants, it suddenly became a key element in Adam Hinkley's decision to join in the Shareholders' Agreement and assign his software to the company. We do know however that, by the Agreement in Principle which Mr. Hinkley signed on 10 September 1997, Messrs. Page and Rabbat had been allocated options over a total of 300,000 shares at 50 cents each while 500,000 shares at \$1.00 each were intended for a second share

issue to private investors.

(c) The version of events put forward by Hotline Communications is logical, rational, and accords with what one would expect in the ordinary course of events. Contrary to paragraph 1.26 of Mr. Hinkley's written submissions of 11 September 2000, there is nothing at all improbable or unfair about the "deal" to which he agreed.

For these reasons, it is impossible to accept the defendants' version of the alleged representation.

In his written submissions of 11 September 2000, Mr. Hinkley described the Shareholders' Agreement as "uncertain". In this context, section 2.06 of the Agreement is particularly important. It is headed "Intellectual Property". It is in the following terms:

"Hinkley acknowledges he has assigned to the Corporation absolutely for nominal consideration of \$1, which he acknowledges receiving, his right and title to Intellectual Properties consisting of all telecommunications and programming protocols and software applications (Hotline and AW Class Libraries) developed and being developed for the Internet by him. Each of Bordin, Gregory and Roks acknowledges they have assigned to the Corporation absolutely for nominal consideration of \$1 each, which they acknowledge receiving, their right and title to Intellectual Properties relating to Hotline and AW Class Libraries developed and being developed for the Internet by each of them."

The "uncertainty" in this clause arises from its use of the phrase "developed and being developed for the Internet". The AW class library was being developed for more than the Internet. Even if the words in question were an apt description of an exclusively Internet product such as the Hotline software, they therefore constitute, at best, a partial and misleading description of the library. There thus arises a doubt about the subject matter of the assignment. Was it of no more than (library) software "developed and being developed for the Internet", with so much of that software as did not fall within that description being reserved to the assignor? This is the position taken by the defendants. Or was the impugned phrase intended to be merely descriptive (albeit carelessly and inaccurately so) and as such to cover the entirety of the Hotline and AW programs, including such aspects of the latter as were designed for use other than "for the Internet"?

There being a doubt, I must reject Hotline Communications' submission that section 2.06 is clear. Of greater substance is its argument that the words "developed and being developed for the Internet" are merely descriptive and that, if Mr. Hinkley is correct, one would expect the

section to have been differently worded: if it was indeed intended there be a limited assignment, that intention would surely (as the plaintiffs contend) have been expressed in words such as the following:

"... has assigned to the corporation only for the purposes of its own use and relating to the [I]nternet his right and title to the intellectual property consisting of the telecommunications and programming protocols and software applications known as Hotline and insofar as the same is necessary for Hotline's operation on the [I]nternet, the App Warrior class libraries."

There is, I think, much force in this argument. The object of the exercise is now, as it was for those who drew section 2.06, accurately to identify the subject matter of the assignment. It is legitimate in this context to consider the "genesis" and "aim" of the transaction, and if necessary to receive evidence to that end: *Codelfa Construction Pty. Ltd. v. State Rail Authority of N.S.W.*[5] The ultimate aim of all parties to the Shareholders' Agreement was to attract capital: \$500,000, at least. Because investors do not like unnecessary uncertainty, it must also have been a concern of all parties to avoid uncertainty in the description of the subject matter of the company's principal asset. In the result, that end was not achieved; but if it had been intended to limit the assignment of the library software to that portion of it "developed and being developed for the Internet", then one would expect much greater precision in the definition of what was being transferred and what was not. At least, in those circumstances, potential investors would know where they stood. If the whole was to be assigned, then it is much more likely that less care would have been given to the wording of the section. That, it seems to me, is what happened. In other words, the carelessness with which section 2.06 was drawn reflects the fact that there was to be no limitation in what was assigned.

Both sides sought to bolster their respective positions by reference to the evidence. There are, of course, limits to the extent to which this may be done. The "broad thrust" of the applicable rule was stated by Lord Wilberforce in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*[6], in a passage cited by Mason, J. in *Codelfa* at 348:

"The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive."

After referring to the above passage, Mason, J. went on to point out that "the English rule forbidding recourse to extrinsic evidence is not as strict as some have thought." In the first place, "evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning": Codelfa at 352. "Surrounding circumstances" embrace, it seems, the commercial purpose of a commercial contract (such as that in question here), including "knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating": Reardon v. Smith[7].

In the context of this case, it is also relevant to note that Lord Wilberforce himself had, in a judgment delivered before L. Schuler A.G., acknowledged that "at any rate since 1859 it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term": Prenn v. Simmonds[8]. This is perhaps an instance of the operation of a wider principle, the boundaries of which are not yet settled, that the courts ought not place on the words of a contract a meaning which the parties have united in rejecting: see Codelfa at 353, per Mason, J.

Given the accuracy of the above exposition of the relevant law, it is I think open to me to have regard, in construing section 2.06 of the Shareholders' Agreement, to some of the evidence called in this trial. Thus, I take into account the unchallenged fact that the AW library software is capable of non-Internet application, such as for eText and "telephone-related" products written for Redrock including SPFS, SMS Monitor and ENS. One would therefore think that it is possible to distinguish, and to do so clearly, between the library's Internet and non-Internet applications. Once that were done, it would doubtless also be possible as a matter of practicality to take advantage of section 196(2) of the Copyright Act, which provides that an assignment of copyright may be limited in any way. But, if it is possible to make that clear distinction, then section 2.06 of the Shareholders' Agreement fails to do it.

This is an especially significant omission given that, both before and after the signing of the Shareholders' Agreement, Hotline Communications held itself out as providing client/server technology for both Internet and Intranet use. Indeed, in May 1997 a Business Plan was prepared on behalf of the company for distribution to potential investors. In this document, Hotline Communications is described as "an emerging provider of software for linking people and information over the Internet and Intranets". Its market is said to be that "for internet/intranet software". Again, on 21 October 1997 Mr.

Adam Hinkley joined in signing a Resolution of the Board of Directors of Hotline Communications authorising the issue of a prospectus - known as a "Private Offering Memorandum" - which contained the following passage:

"The Hotline Solution Hotline's software is new client/server technology for Internets (sic) and Intranets uniquely engineered to enable enterprise-wide (Intranet) or world-wide (Internet) (i) file sharing, (ii) data and information sharing and distribution, and (iii) collaboration, messaging and discussion. Hotline combines the most frequent uses of the Internet, using a graphical interface, into one small manageable application."

It may be that the distinction between the Internet and Intranets is more apparent than real. Both are concerned with network communication, the essential difference being that the former is world-wide, while the latter is confined to a single organisation. As I understand it (an understanding based upon my reading of the Private Offering Memorandum), both use IP (Internet Protocol). On the other hand, I find it impossible to reconcile the proposition that Mr. Adam Hinkley reserved from his assignment non-Internet uses of his software with the fact that he at the same time promoted Hotline Communications as a company whose technology embraced both the Internet and Intranets.

It is also significant that, after the execution of the Shareholders' Agreement, Mr. Paul Hinkley sought the permission of Hotline Communications, through Mr. Austin Page, for his continued use of the AW library in the development of eText. Indeed, Mr. Hinkley prepared a draft agreement, which he submitted to Mr. Page in November 1997, by which Hotline Communications was to grant a licence for that very purpose. I will return to this point (see paragraphs [137and 138]). It is sufficient for the present to note that, in section 3 of the draft, under the heading "Intellectual Property" Mr. Hinkley acknowledged that "[t]he AW Class Library in its present and completed forms as presently envisaged is the intellectual property of [Hotline Communications]".

In my opinion, this evidence is consistent only with the conclusion that all parties to the Shareholders' Agreement understood that the assignment effected by section 2.06 was unqualified. It is true that some evidence was put forward by the defendants to the effect that Mr. Paul Hinkley's draft licence agreement was prepared not out of a belief that all Mr. Adam Hinkley's interest in his AW library and Hotline software had been assigned, but out of an excess of caution. I do not accept this evidence. On the contrary, I find that the evidence of both Mr. Adam Hinkley and his father on the question of

the assignment lacks all credibility.

This conclusion may, I think, be justified by reference, first, to Mr. Adam Hinkley's witness statement dated 7 August 2000 (Exhibit AH 5). He there states that at a meeting with Messrs. Page, Rabbat, Bordin, Gregory, Roks and Mr. Paul Hinkley on 17 September 1997, having been told that an assignment of software was part of the bargain, he proposed the "Internet only" limitation. Paragraph 46 of the witness statement is as follows:

"46. I had no idea as to whether this was true or not [i.e. that Mr. Hinkley was, as the Canadians insisted, obliged - if venture capital was to be attracted - to assign the Hotline and AW intellectual property to Hotline Communications], so instead I said that the assignment of any intellectual property by me to the Hotline Communications company would only be of the Internet component of the software. Austin Page asked the others at the meeting for comment on this issue, but no specific objections were raised. It was then agreed by everyone that the intellectual property to be assigned by me would be the Internet component of Hotline and AW for the Internet. At the request of Paul Hinkley the draft agreement was amended."

The documentary evidence and the evidence of Mr. Paul Hinkley does not support this account. In his witness statement dated 7 July 2000 (Exhibit PH 7) Mr. Paul Hinkley states that at the 17 September meeting he did raise concerns about the original draft of the Shareholders' Agreement. Section 2.06 then consisted of a single paragraph. This purported to assign interests attributed to each of Messrs. Bordin, Hinkley, Roks and Gregory. The statement then continues:

"21. I distinctly recall that, after reading the draft clause 2.06, I said to the directors of [Hotline Communications] who were in attendance at the meeting: 'The wording of this clause is inaccurate. This implies that Bordin, Roks and Terry Gregory were involved in the development of the Hotline and AW software. This is not right. The document should reflect that the Hotline and AW software has been developed and will be developed by Adam alone.'

22. Austin Page replied: 'Yes, you're right. Can you suggest some alternative wording?'

23. I then made some handwritten changes to my copy of the Draft Shareholders' Agreement and said: 'The wording in paragraph 1 can stand provided reference to the three others (being Bordin, Roks and Terry) is taken out.'

24. All the Hotline Directors at the meeting agreed with my suggestion. The clause dealing with intellectual property was later amended that same day at the office of Harry Burkman [the solicitor engaged by Hotline Communications who drafted the Shareholders' Agreement] to read as Section 2.06 of the Shareholders' Agreement which is exhibited as 'TG 4' to the Affidavit of Terrence Gregory of 10 September 1998. I agreed to the second paragraph of the amended Section 2.06 being included on the strict understanding that the intellectual properties referred to therein as they related to Terrence Gregory was the NetScrawl software program and as they related to Bordin and Roks to their business and financial plan documents."

A draft copy of the Shareholders' Agreement (CB Vol. 6.2508 at 2517) bearing handwritten annotations by Mr. Hinkley shows that the words "developed and being developed for the Internet" were already present.

Moreover, the evidence given by Mr. Adam Hinkley is totally inconsistent with the version propounded by the Hotline Communications witnesses. In paragraph 27 of his witness statement Mr. Bordin says: "Before signing, Austin Page expressly told Adam Hinkley and Paul Hinkley that, with respect to AppWarrior, nothing less than the absolute assignment to the Company of all intellectual rights in AppWarrior would be acceptable were the Company to ever successfully become a public company." Evidence to this effect was also given by Messrs. Rabbat and Page. Nor did either defendant put to Mr. Harry Burkman, who was called as a witness by the plaintiffs, that section 2.06 had been amended at the request of the Messrs. Hinkley to include the words "developed and being developed for the Internet". I accept the evidence of Messrs. Bordin, Rabbat and Page. I nevertheless restrict its application to issues of credit. It is, in my opinion, not relevant to questions concerning the proper construction of section 2.06 of the Shareholders' Agreement. In relation to credit, however, I note that Mr. Paul Hinkley does not corroborate the evidence of his son as set out in paragraph 46 of Mr. Adam Hinkley's witness statement of 7 August 2000. On the contrary, he refutes it - albeit by inference. I therefore reject paragraph 46. Consistently with my findings concerning credit, I also reject the proposition that Mr. Paul Hinkley's draft licence agreement was drawn out of an excess of caution. I find that it was prepared because all parties to the Shareholders' Agreement accepted that the assignment by Mr. Adam Hinkley of the Hotline and the AW software was absolute.

In my opinion, for the reasons which I have endeavoured to articulate above, section 2.06 of the Shareholders' Agreement effectively assigns to Hotline Communications the entirety of Mr. Adam Hinkley's interest in the software of both Hotline and the AW Class Library. It also



follows that Mr. Hinkley's submissions concerning the combined effect of ss.117 and 119 of the Copyright Act have no foundation. These submissions rely on a finding that the relevant assignment was partial, or for a particular purpose. I have found that it was neither. Nor was the transaction one by which Hotline Communications became an exclusive, or any other kind of, licensee. The two sections, however, only operate where a licence - as opposed to an assignment - has come into existence.

In his further amended Defence dated 23 October 1998, Mr. Adam Hinkley pleads that at the time of execution of the Shareholders' Agreement he was to the knowledge of the plaintiffs under a special disability. He was, it is alleged, young, inexperienced, ignorant of the true facts, and without legal advice.

In my opinion, there is no substance to these allegations. Mr. Hinkley was not under a disability. He was and is an adult of sound mind. Indeed, he is a particularly intelligent young man. He rightly proclaimed himself to the world as the creator of remarkable and valuable computer software. He announced that he wished to exploit that software, and that he was looking for persons who would join him in that endeavour. He thus placed himself, by his own initiative and by his own free choice, within the world of commerce. By doing so he represented to the world - as was in any event the fact - that he was not someone entitled by reason of disability to the special protection of the principles of equity. Moreover, his father was available to act (and did act) as his adviser; and shortly before the execution of the Shareholders' Agreement the solicitor for Hotline Communications (Mr. Burkman) advised him to seek independent legal assistance. He failed to take this advice. In those circumstances, he was by no means in a special category of disadvantage. Even if he was, I do not (for the reasons I have already given) accept that the conduct of the plaintiffs towards him was in any respect unconscionable.

I now turn to the claims brought against Mr. Paul Hinkley and Meta Consultants by both Redrock and Hotline Communications. Redrock first alleges breach of copyright. It also alleges that, being aware both that his son was writing the relevant software in the course of his employment with Redrock and that Redrock was unaware that those programs were being developed for the benefit of Hotline Communications and Meta Consultants, Mr. Paul Hinkley aided, abetted, counselled or procured and induced and was knowingly concerned in or was a party to Adam Hinkley's contraventions of the Corporations Law. Redrock further alleges that Mr. Hinkley and Meta Consultants assisted Mr. Adam Hinkley to breach his fiduciary obligations by receiving or purporting to receive a licence to use the programs either with knowledge of the breaches by the latter, or wilfully shutting their

eyes to such breaches, or wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make, or with knowledge of circumstances that would indicate a breach. Redrock claims that any such licence is held by the defendants as a constructive trustee for it. A cause of action is also brought in conversion.

For part of the interlocutory process and throughout the trial Mr. Paul Hinkley represented himself and Meta Consultants. He did not represent Mr. Adam Hinkley. At the time that Mr. Hinkley filed a defence to the Redrock statement of claim on 17 December 1999, again when, on 31 March 2000, he filed a supplementary defence, and yet again when he filed a further amended Defence on 29 August 2000, he and Meta Consultants were no longer represented by lawyers.

Unfortunately, all of these pleadings reflect this position. However, from these documents it is possible to summarise the position of the second and third defendants in the Redrock proceedings as this: they deny that the library and Hotline software were written by Mr. Adam Hinkley in the course of his employment by Redrock; then they allege that it is therefore irrelevant that Redrock may (or may not) have been unaware that he was dealing with those programs with respect to Meta Consultants and Hotline Communications; research, design and development for what has been termed "eText Version 2" and the AW library commenced jointly between Meta Consultants and Mr. Adam Hinkley years before the latter's employment by Redrock, although some portions were designed and developed concurrently with the term of his employment but not as part of his employment; any allegation that Mr. Adam Hinkley granted a licence to Meta Consultants to use Hotline is incorrect - the purported licence related to the library only; the second and third defendants deny using or modifying the Hotline software, but appear to admit using or modifying the library; they say Redrock was "well aware" that the second and third defendants were in the software business and did not object to Mr. Adam Hinkley developing software "until the instigation of these proceedings"; they deny all the allegations with respect to any breach of the Corporations Law and fiduciary duty, and deny in any event any knowledge of any breach which may have been committed by Mr. Adam Hinkley; they deny breach of copyright and plead a belief that Adam Hinkley was the owner of AW and Hotline; and finally, they deny the allegation of conversion, saying that PXB, a product all the rights in which were (as they believed) held by Mr. Adam Hinkley, was the tool by which the further development of eText was accomplished.

The gist of the defence filed by Mr. Paul Hinkley and Meta Consultants is that they believed that Mr. Adam Hinkley was the owner of the copyright in the AW library and, as such, had the right to give a

licence to use it to develop eText. I have already concluded, for the reasons set out above, that this belief was misplaced. In these circumstances, section 116(2)(b) of the Copyright Act is relevant. It provides:

"A plaintiff is not entitled by virtue of this section to any damages or to any other pecuniary remedy, other than costs, if it is established that, at the time of the conversion or detention:

...

(b) where the articles converted or detained were infringing copies - the defendant believed, and had reasonable grounds for believing, that they were not infringing copies."This provision does not, of course, entitle a party to retain any infringing copy; rather it limits the remedies to which a successful plaintiff is entitled. Therefore, even if I accept that Mr. Paul Hinkley believed on reasonable grounds that Mr. Adam Hinkley was the true owner of the copyright in the AW library, Redrock is entitled, having established its ownership of the software, to seek such remedies as the return of any infringing copy of the software and injunctive relief together with costs.

Some portions of the 29 August 2000 pleading filed by the second and third defendants directly address the state of Mr. Paul Hinkley's belief about his son's employment status with Redrock. An example is the plea that Mr. Paul Hinkley believed that his son was "working under a contractual arrangement ... because I understood he was using his own software tools, had no explicit or implicit terms of employment, was given no training and worked under minimal project management and supervision as is customary software industry practice for contractors ..." Nor, according to the pleading, was Mr. Hinkley aware that Redrock was paying Adam's superannuation. He therefore believed that Adam was "a contractor or effectively a contractor". He also pleads that Redrock did not contribute to the development of AW or Hotline in any "substantive material way", whereas Meta Consultants did so by providing to Adam the use of its computers and software, as well as training and mentoring.

I have found that Mr. Adam Hinkley did develop the library in the course of his employment, but that he held the copyright in the Hotline software (excluding the library). Given these conclusions, the issue in relation to Mr. Paul Hinkley is the extent to which, if at all, the evidence demonstrates that he was aware or ought reasonably to have been aware of the true position with regard to the library software. In this context it is relevant to consider Mr. Hinkley's evidence about the background to the development of the

library. He said that after an initial, unsuccessful, attempt to develop the eText software using two external programmers, he and Mr. Adam Hinkley talked as early as 1993 about the idea of creating a library from which eText could be built (T. 2487). They rejected the commercially available products as too "bloated" and decided that Mr. Adam Hinkley would "attempt to develop [a better solution] using the C++ language" (Exhibit PH 12 paragraph 5). Meta Consultant's principal goal was "cross-platform development". As Mr. Paul Hinkley explained: "The whole mission, if you like, of AW was to come up with a library that eventually would allow development to be done once but used on two or more - but two different platforms, namely Macintosh and Windows" (T. 2688). Mr. Paul Hinkley decided to base the ongoing development of a second version of eText on the library being written by his son. It was for this reason that he (or, more accurately, Meta Consultants) entered into the "non-exclusive licence" to which I refer in paragraph [8] above (Exhibit PH 8).

The question of a pre-existing licence between Mr. Adam Hinkley and Meta Consultants arose during the course of the trial and resulted in the further amended Defence from the second and third defendants filed on 29 August 2000. Mr. Paul Hinkley contended under cross-examination that Exhibit PH 8 had been lost and had not been rediscovered until late in the trial before me, despite the fact that (a) the issue of a licence had been argued extensively in a five day interlocutory application before Warren, J. and (b) several affidavits of documents had been sworn by both himself and Mr. Adam Hinkley. I accept his evidence that at the time of the interlocutory application he had a "vague recollection of it" (i.e., the licence) but that when he searched the files of Meta Consultants he could not locate it. Nor could he find an electronic version (T. 2512). He said he had not subsequently remembered the written licence until asked to produce any such document by Mr. Wilson during the early stages of the trial. After inquiring with his assistant, he eventually located a copy of the document in an archived personal file for Mr. Adam Hinkley in a filing cabinet "in a shed". The original document cannot be located. He confirmed under oath, and I am prepared to accept, that the original document was signed by himself and Mr. Adam Hinkley in or about July 1995.

Mr. Hinkley sought to argue that "Adam's App Builder" referred to in Exhibit PH 8 was the same as the library which, under the name "AppWarrior" Mr. Adam Hinkley took with him when he left Redrock in September 1997. I have found that, for copyright purposes, it was not. This finding is entirely consistent with Mr. Hinkley's own evidence that in the software programming industry libraries are in a continual state of development and must be constantly revised so as, for example, to keep pace with advancements in operating systems (T.

2519-2520). I also accept that, this being so, he believed that the licence granted by his son on 15 July 1995 contemplated these revisions while remaining in full force and effect despite them. In my opinion, this belief was reasonable.

It is true that the document itself does not explicitly deal with this point. Here is an apt example of the pitfalls that occur when lay people, notwithstanding their experience and intelligence, attempt to draft documents in relation to transactions of some inherent complexity that purport to have a legal effect. Although there is much to applaud in Mr. Hinkley's desire to employ "plain English", the fact remains that, in striving to accomplish this goal, he has produced a licence agreement which does not say what Mr. Hinkley now says that it means. For example, it does not say that Meta Consultants has a licence to use subsequent enhancements to the library. Again it states that it is agreed that Meta Consultants "retain complete ownership of software products built with [Adam's App Builder]." I accept Mr. Paul Hinkley's evidence that he did not mean that Meta Consultants would thereby own the Hotline software or the applications written for Redrock using the library. However, on its face that is exactly what the documents says. In both instances Mr. Hinkley asks the Court to qualify what is otherwise the clear import of the document.

Here, there is evidence before me, which I accept, that libraries by their very nature must be continually upgraded and revised. This was known to both Mr. Paul Hinkley and his son. A licence that purported to cover only one version of such software frozen in time would be unworkable, in particular where the document on its terms states that the library is to be used to develop Macintosh applications which, presumably, would need to accommodate upgrades to the Macintosh operating system. In these circumstances it seems to me that the description "Adam's App Builder" must include subsequent enhancements.

In early 1996 Mr. Paul Hinkley knew that Adam was working at Redrock as its only "specialist-Mac programmer" and he was assured by him "on numerous occasions that [Redrock] had indicated that they had no interest in cross-platform software development": see paragraph 12 of Mr. Hinkley's witness statement dated 27 June 2000. This appears to be inconsistent with the fact that Redrock was in the business of writing applications for both PC and Macintosh - a fact that Mr. Paul Hinkley must have realised. He said that he was not aware that Mr. Adam Hinkley's work at Redrock involved rewriting, expanding and improving the library (T. 2531), although he later gave evidence that he knew the library was necessary for the work being performed by his son for Redrock; but he thought Redrock was "happily benefiting from that" (T. 2534). He knew that Mr. Adam Hinkley was working on the

library because that was an integral part of their joint work on eText (T. 2534). I nevertheless accept that Mr. Paul Hinkley regarded the library as a separate software program being developed independently of any work for Redrock. So, he gave evidence that he had a longstanding understanding based upon discussions with his son, that the latter had an agreement with Redrock. By that agreement, the copyright in AW would (as he - incorrectly - believed) remain with Adam (T. 2606), a fact that some time later led Mr. Paul Hinkley to draft an e-mail to Redrock stating as much (CB. Vol. 6.2633).

Mr. Adam Hinkley told his father in the later part of 1996 that he was only given "occasional" project management by Redrock and no direct supervision, coaching or mentoring. All this evidence is consistent with Mr. Paul Hinkley thinking his son was being employed under a contract for services. However, the situation is confused by evidence contained in paragraph 19 of his 27 June 2000 witness statement: "I recall on one occasion that Adam told me that [Redrock] were contemplating putting him on contract, as distinct from salary."

There is no evidence that this suggestion was ever acted on. On balance, however, I accept that Mr. Paul Hinkley was at the least uncertain about his son's precise status at Redrock, and probably did believe, mistakenly, that Redrock did not own the copyright in Mr. Adam Hinkley's work on the library. Nor do I find that Mr. Hinkley was aware of any of his son's activities at Redrock with regard to the Hotline software. As such, I cannot conclude that Redrock's allegations that Mr. Paul Hinkley aided, abetted, counselled or procured or induced or was knowingly concerned in his son's breach of the Corporations Law are made out. Given my determination in relation to the ownership of the AW library, I find that Mr. Hinkley did breach Redrock's copyright; however, on balance I conclude that Mr. Hinkley did so innocently and reasonably. As such Redrock is not entitled to seek damages or any other pecuniary remedy against Mr. Paul Hinkley.

Hotline Communications alleges against Mr. Paul Hinkley that he acted as adviser to Mr. Adam Hinkley concerning the Shareholders' Agreement and was fully aware of Hotline Communication's proprietorship of the Hotline and AW library software. Hotline Communications further alleges that, notwithstanding this, Mr. Paul Hinkley and Meta Consultants have used those programs for their benefit with knowledge of Mr. Adam Hinkley's breach of each of the Shareholders' Agreement, Hotline Communication's copyright and Mr. Hinkley's fiduciary duty to Hotline Communications. In particular, it is alleged that Mr. Paul Hinkley and Meta Consultants breached Hotline Communication's copyright by developing eText (version 2) using, without licence or authority, the Paradox library which, Hotline Communications alleges, contains either an infringing copy or at least a substantial part of

the AW library. Any copy of the Hotline software or the AW library is therefore held on trust for Hotline Communications. Moreover, a claim is brought in conversion and detinue on the basis that Mr. Paul Hinkley aided and abetted Mr. Adam Hinkley in wrongfully detaining the relevant software and that he took advantage of that conduct to both write eText and attempt to negotiate a restructure of Hotline Communications to the advantage of the defendants.

The defendants had the benefit of legal representatives at the time that a defence was filed on their behalf in response to the Hotline claims. In respect of Mr. Paul Hinkley and Meta Consultants, it is conceded that Mr. Hinkley discussed the Shareholders' Agreement with his son, but otherwise it is denied that he acted as his adviser. While it is conceded that the Messrs. Hinkley worked together to "revise" eText, it is denied that in doing so they breached any copyright held by Hotline Communications. It seems the basis for this is that Mr. Adam Hinkley only assigned to Hotline Communications the intellectual property in the software "developed and being developed for the Internet"; otherwise Mr. Adam Hinkley, as owner of the remaining copyright, was entitled to exercise all rights of copyright in the programs.

I have already addressed in some detail the arguments in respect of the alleged representation concerning the \$500,000 investment. Those remarks and conclusions apply equally to Mr. Paul Hinkley and Meta Consultants. It is, however, relevant to consider briefly Mr. Paul Hinkley's state of mind regarding the validity of the Shareholders' Agreement, and therefore his position in relation to using the AW library to continue to develop eText both before and after his son returned to Australia from Canada in March 1998.

The evidence of Mr. Paul Hinkley regarding his belief as to the validity of the Shareholders' Agreement and its effect on the ownership of the AW library is ambivalent. On the one hand, he conceded that Mr. Adam Hinkley assigned both the Hotline and AW library software to Hotline Communications, and that he knew this. Consistently with this concession he gave evidence that prior to the execution of the Shareholders' Agreement he raised with Mr. Page concerns about the effect that the assignment would have on his continued use of the AW library to develop eText. He says that Mr. Page reassured him that the assignment would not affect his ability to use the AW library and suggested his position would be protected by the execution of a non-exclusive licence between Hotline Communications and Meta Consultants. Mr. Hinkley therefore drafted a licence agreement on his return to Australia which he submitted to Mr. Page in November 1997. I have already referred (at paragraph [114] above) to section 3 of that document, which is headed "Intellectual

Property". It expressly and without qualification acknowledged that: "The AW Class Library in its present and completed forms as presently envisaged is the intellectual property of [Hotline Communications]". Despite the fact that neither this agreement nor any other licence was ever executed, he continued to use the AW library for his work on eText with, Mr. Hinkley says, the knowledge of Mr. Page.

While maintaining this position, Mr. Hinkley also sought to rely on the argument that the software assigned to Hotline Communications was limited to software "for the Internet"; that he was using the AW library for non-Internet purposes in developing eText; and that his continued use was therefore permissible under the existing licence from his son. My findings in relation to section 2.06 of the Shareholders' Agreement lead me to conclude that if Mr. Hinkley had this belief, it was mistaken. However, it seems to me Mr. Hinkley's conduct in seeking reassurance from Mr. Page about his position and submitting a form of licence to Hotline Communications points to the fact that, at that time, he did not believe that his son retained any of the copyright in the AW library. On the other hand, he did in my opinion believe on reasonable grounds that Hotline Communications had no objection to his use of the AW library for the development of eText.

Mr. Hinkley also sought to argue that the Shareholders' Agreement was no longer valid because of breaches of "trust" and "good faith". He therefore explained that "at the time I believed that [Hotline Communications was] wrongly making that assertion [i.e. that it owned the copyright in the programs], given that the deal hadn't worked out, the \$500,000 hadn't been invested and so forth, but I gave them the benefit of the doubt, that they were giving it in an honest way" (T. 2730).

Mr. Hinkley says he was first given a copy of the Shareholders' Agreement on 16 September 1997. He did not realise that matters had progressed as far as they had; he thought the document was merely for discussion so while he read it, he did not "digest" it. Although he gave evidence that he thought the execution of the Shareholders' Agreement would "trigger" the \$500,000 investment, and he assumed that the document contained something to that effect, he conceded that he did not read it carefully enough to appreciate that it included no mention of any such investment. If this is true (and I do not think that it is) his carelessness is astounding.

The conduct of Mr. Paul Hinkley during the latter part of 1997 and early 1998 does not sit well with his assertion that he regarded the Shareholders' Agreement as invalid because of misrepresentation about the \$500,000 investment. In particular, Mr. Hinkley's failure to



mention this grievance at all - either in conversations with Mr. Rabbat or Mr. Page or in any written communications - is, as I have said at paragraph [101] above, extraordinary. Mr. Hinkley gave evidence that he thought that to do so would be stating the obvious, that the issue had "come and gone" (T. 2643) and that it was a problem that the defendants, as "nice guys", "tolerated in good faith" (T. 2697). He also says he did not raise the matter with Mr. Page because he was hoping to interest Mr. Page in eText and he did not want to embarrass him or press him too hard. However, he had no hesitation in complaining to Mr. Page in mid to late November 1997 "bitterly [and] quite strongly" (T. 2642) about how Hotline Communications was being mismanaged. I therefore conclude that the \$500,000 representation was not an active issue at that time for Mr. Paul Hinkley. Nor do I accept that, at that time, he regarded the Shareholders' Agreement as conferring only a partial assignment of the software.

I accept that Mr. Hinkley had no knowledge, until after the event, of his son's conduct in deleting the software from Hotline Communication's computers, encrypting what remained and shutting down its web site when he suddenly left Canada. He acknowledged - in the circumstances, he could not do otherwise - that he was "embarrassed and shocked" by this behaviour. I further accept that he made genuine efforts to negotiate between his son and Hotline Communications. Moreover, as a "conciliatory gesture" (T. 2738) and to "progress" matters on the basis that it was "the best commercial solution" (T. 2731), he agreed to ask his son to send the source code to Hotline Communications in Canada. I accept that he was misled by his son in that he was not aware that the copy of the software sent to Canada was encrypted.

Nor do I agree with the interpretation urged upon me by Hotline Communications of the discussion paper entitled "Hotline Communications Ltd - Proposed Restructure" dated 29 March 1998 prepared by Mr. Paul Hinkley: namely that it was a cynical attempt by Mr. Hinkley to exploit the situation by forcing Hotline Communications to renegotiate the arrangements in a way that would also benefit him and Meta Consultants. Mr. Paul Hinkley did not in general present as a devious or opportunistic person. He did strike me, however, as at times unrealistic and naïve in his business dealings; he frequently demonstrated a lack of objectivity which led to unilateral and inexplicable actions on his part, and an inability properly to comprehend the effect of such conduct on those with whom he dealt (in particular an inability impartially to judge the seriousness of his son's last actions in Canada). Mr. Hinkley also failed to appreciate the binding nature of legal documents, and to communicate clearly the position taken by the defendants. But it was these very characteristics which contributed to, indeed resulted in, his belief

that Mr. Page (and through Mr. Page, Hotline Communications) had given the requisite consent to his continued, albeit limited, use of the AW library.

Both Redrock and Hotline further allege (see for example the amended Statement of Claim of Hotline Communications dated 6 September 2000) that the defendants breached their copyright in the AW library by copying it to create the Paradox (otherwise known as "PXB") library. The Messrs. Hinkley deny this; they say that the Paradox library was developed independently of the AW library after Mr. Adam Hinkley returned to Australia from Canada in March 1998.

Evidence was given by Mr. Andrew Blucher, a lecturer with the School of Computer Science and Software Engineering at Monash University, who was called as an expert witness by Hotline Communications. Mr. Blucher was originally jointly retained in October 1998 by both Hotline Communications and the defendants as an independent expert. His brief was to compare the AW and PXB software. In a report dated 21 October 1998 (Exhibit H 3) based upon instructions prepared by the defendants, Mr. Blucher found that "between (roughly) one half and two thirds of the PXB software is identical to the AW software." He concluded that:

"The large sections where the files compare equal provide strong evidence that the PXB software is based on a copy of a version of the AW software. While similar function can lead to similar program code, it usually does not lead to identical code even in small sections. In this case there are tens of thousands of lines of code that compare equal. The observed large number of superficial differences are consistent with the kind of incremental modifications programmers make during development of a new version of a software product from an existing version. The files that compare equal provide strong evidence that at least a partial copy of the AW software is present in the AW (sic) folders. The file creation dates are strong evidence that the files were created before March 1998, although file creation and modification dates can be tampered with. The existence of file modification dates before March 1998 for the equal files is also relevant. In my opinion the PXB software is clearly based on a copy of a version of the AW software. This is a strong opinion with little room for doubt."

Professor Zobel and Dr. Harris also concluded that there were substantial similarities between the PXB library and the AW library: see their report dated 10 May 2000 (Exhibit R 5). They further found that 201 of the files in the PXB software were created before September 1997 and that, in turn, 173 of these had the same creation date, time and name as the September 1997 version of the AW library.

There is in my opinion nothing in this evidence which is inherently incredible or unconvincing. Indeed, it seems to me that, taken by itself, it proves that there was such a degree of similarity between the AW and PXB software that the latter was a substantial reproduction of the former. This conclusion is strengthened if one accepts, as I do, Mr. Blucher's evidence, to be found in his report of 21 October 1998, that "many of the different lines ... differ ... in minor or superficial ways."

The defendants' attack upon this evidence fails to throw any real doubt upon it. Mr. Adam Hinkley begins by submitting that the plaintiffs "have misidentified the constituents of Paradox": see his submission dated 11 September 2000. The only evidence he cites for this proposition is a comment in the Zobel/Harris report of 10 May 2000 to the effect that "[i]t was not always clear exactly which files were intended to comprise the suite of code in each case." But the only example given by the authors of the report concerns the September 1997 version of the AW library. There is no direct assertion that "the constituents of Paradox" were difficult to identify; and the only inference which points in that direction is the vague statement ("it was not always clear exactly") upon which Mr. Hinkley has seized. On the other hand, Professor Zobel and Dr. Harris list, in Appendix B to their report of 10 May, the data provided to them for the purposes of their work. This data included "[a]ll files matching ... the sub-directory 'PXBlDr Folder'." There is no suggestion from Mr. Hinkley that any "misidentification of the constituents of Paradox" has occurred thereby.

The position with Mr. Blucher is even clearer. If he misidentified the constituents of Paradox, then it is the defendants who are responsible. In their brief to Mr. Blucher, they provided him with a reference to the relevant AW source code (a CD dated 10 February 1998) and with a list of the relevant PXB files. Mr. Blucher based his analysis on these instructions.

Next, Mr. Hinkley submits that each of AW and PXB contained significant portions of the same unoriginal source code - that is, source code previously written by a third party and reproduced by Mr. Adam Hinkley in AW and PXB, he having the requisite permission to do so. He relies at this point on material prepared by Dr. Michael John Creek, a computer consultant. Dr. Creek identified 31 PXB files as containing "third party" code; but (according to Professor Zobel and Dr. Harris, in an assessment which I adopt) this constitutes only 11% of the total number of PXB files examined by Dr. Creek.

Dr. Creek nevertheless found, uncontroversially, "that both the PXB

and AW libraries contain code that originates from third party sources." Mr. Hinkley, however, seeks - and needs - to go further. He includes in his submission of 11 September 2000 the statement that "Paradox contains source code which is identical or nearly identical to AW, that source code ... [originating] from third party sources."

There is no evidence to substantiated this assertion. Dr. Creek's account of his instructions says nothing about any comparison between the third party code in the two libraries; and Dr. Creek himself does not suggest - let alone state explicitly - that the third party code in PXB is the same third party code as that to be found in AW. In short, the evidence establishes no more than that both PXB and AW contain "third party code". So far as the evidence discloses, that code in the one case might be totally different from the third party code to be found in the other library.

Having argued that any similarity between PXB and AW is in part explicable because they adopt the same third party code, Mr. Hinkley then submitted that another innocent explanation for any similarity is their incorporation of lines which are "blank lines, pure syntax, e.g. lines that contain nothing except a { symbol, and lines due to a programmer's personal working style": report of Dr. Creek dated 18 January 1999. According to Dr. Creek, about 44% of the lines of each of the files examined by him met this description. He did not say what proportion of these lines were of third party code.

Dr. Creek's reports were admitted into evidence, although he was not called as a witness (the defendants informed me, and I accept, that they could not afford his fee). He was not, therefore, cross-examined; and his evidence must be assessed accordingly. In this context, it is relevant to note that on 11 July 1999 Professor Zobel and Dr. Harris completed a report in reply to that of Dr. Creek. They there commented that:

"The figure of around 44% for pure syntax lines is reasonable. However, in our earlier report of 10 May 2000 we established that 13% similarity between files written by Mr. Hinkley can be ascribed to lines of pure syntax or other random similarities. Thus 13%, not 44%, is the baseline figure of similarity between unrelated files written by Mr. Hinkley."

The passage in the report of 10 May 2000 to which Professor Zobel and Dr. Harris refer is in the following terms:

"Note that two files that contain completely unrelated code will ... have some lines in common. Material such as blank lines, syntax (opening and closing braces and so on), and the start and end of

comment blocks will tend to have the same format in all files by the same programmer, and thus a [comparison] will [show] that these files contain some number of identical lines. To find the proportion of lines that would typically be reported as identical for unrelated code from the library ... we compared each of 165 ... files to a different, randomly chosen ... file ... Over these 165 comparisons, the average percentage of lines reported as identical was slightly less than 13%."

In other words, according to Professor Zobel and Dr. Harris, while 44% of the lines of any particular file written by Mr. Adam Hinkley might be described as blank, or as pure syntax, where two such files contained completely unrelated code, only 13% of the lines of syntax of each would be common to both.

None of the experts ascertained the proportion of lines of syntax which were common to both to AW and PXB. The Court can therefore take the point only so far. I find that Professor Zobel and Dr. Harris are correct in their conclusion that, if the AW software is relevantly unrelated to the PXB software, then something in the order of 13% of the lines of syntax of each would be common to both. The closer the relationship, the greater will be the percentage of lines of common syntax. The defendants contend that the two codes are relevantly unrelated. If that is right, then the percentage of lines of common syntax is likely to be correspondingly low. The plaintiffs, on the other hand, contend that the two codes are closely related. If so, the percentage of lines of common syntax will reflect that circumstance by rising above, perhaps well above, 13%.

Mr. Hinkley correctly submits that there is no copyright in ideas. So, in *University of London Press Limited v. University Tutorial Press Limited*[9] Peterson, J. said:

"The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work', with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author."

From this, Mr. Hinkley goes on to submit that there are many common expressions in programming that could not be protected by copyright, in particular where an idea can only be expressed in one way. This is true, as far as it goes. But one is concerned with the work as a whole, not necessarily with individual phrases or expressions, unless

it can be said that they fall within the definition of a "computer program" in section 10 of the Copyright Act.

The issue is really one of originality. A work that uses a common stock of information may still be an original work where the author has applied to it independent, intellectual effort in the exercise of judgment and discrimination: Sands & McDougall Pty. Ltd. v. Robinson[10]. The word "originality" is used here not in the sense of novelty, but rather in the sense of originating from the author and not copying from elsewhere.

Mr. Adam Hinkley also relies on a report of Dr. Creek dated 18 January 1999 (Exhibit PH 2) in which the author, after conducting a comparison of a random selection of files from both libraries, found in the case of 10 files differences in approach, method and interfaces. In reply Professor Zobel and Dr. Harris say that the selection of files for comparison was not representative and that it not possible to conclude from an examination of only 10 files that there are both substantive and extensive differences between the AW and PXB software libraries. They find that PXB is "clearly derived from the Redrock [AW] library".

Mr. Blucher gave evidence that it was not feasible for Mr. Hinkley to have produced the amount of code to be found in PXB in the time available without using a copy of the AW library as the basis for PXB. He found that approximately half the code in PXB was the same as that in AW. (I note, however, that Mr. Blucher was not asked whether the half of PXB that can be said to be "original" (i.e. different from AW) was of such significant size that, according to his own criteria, it could feasibly have been written in the time available.) In reply, Mr. Hinkley relies on a further report of Dr. Creek dated 21 February 1999 (Exhibit PH 3) which addresses the issue of programmer productivity. Dr. Creek states that the range of productivity can vary substantially and that "... Adam Hinkley, who I regard as a very gifted programmer, could certainly have developed the PXB library over a period of 120 days." In their report dated 11 July 2000, Professor Zobel and Dr. Harris give their reasons why they disagree. After analysing the rate of productivity, they found that Mr. Hinkley would have needed to average 1,000 lines per weekday to write the PXB library without copying AW; this is five times greater than Mr. Hinkley's productivity during his period of employment with Redrock. They found that "such productivity is implausible at best" and that "while the PXB library was modified in this period it was clearly not written from scratch." I accept the evidence on these points of Professor Zobel, Dr. Harris and Mr. Blucher.

This raises the problem that, in the unusual case of the same author writing both the original work and the alleged infringing copy, the

two works may well contain similar content of approximately half. This proposition was not put to the expert witnesses by Mr. Hinkley in cross-examination, although it was made in his written submissions. On this point Professor Zobel says in his report in reply dated 11 July 2000: "... A programmer's style almost never leads to a sequence of identical content lines, just as an author having a style does not mean that the author would tend to re-use the same sentence. While style can lead to similarities between code, then, these similarities are superficial and do not pertain to the content lines." This, it seems to me, accords with reality. Almost any author who, having written anything of any substance, was shortly thereafter asked to reproduce it without copying, would in a second version create something which was recognisably similar to the first but with very little if any of the content expressed in identical terms. In such circumstances, difficulties with copyright law would in general not arise.

In response to the conclusion of Professor Zobel and Dr. Harris that 173 of the PXB files show the same name, creation date and creation time as those in the Redrock version of the AW library, Mr. Hinkley asserts that the creation date and time may stay the same even where the content of the file is substantially altered. He says this evidence is not sufficient to show a breach of copyright. I disagree. The fact that these files have been used, even if the work done on them resulted in readily identifiable differences in content, demonstrates copying from AW. If these files were newly written by Mr. Hinkley without reference to AW, one would not expect to find the same names, dates and times as those appearing in AW.

The ultimate question here is whether it is sufficient to say that a substantial portion of the AW library has been reproduced in the PXB library such that the latter can be said to be an infringing copy of the former. The determination of whether a given part of a computer program is "substantial" depends on its character. If it is "related information" - as it is in the case of AW and PXB - then its substantiality is to be assessed similarly to that of a traditional literary work, but with respect to the entirety of the program in which it is found: Data Access Corporation v. Powerflex Services Pty. Ltd.[11] In my opinion, the evidence establishes that PXB is a reproduction in a material form of a substantial part of the AW library. It therefore constitutes an infringement of Hotline Communications' copyright in that library.

As I have already noted (see paragraph [144]) Hotline Communications alleges in its amended Statement of Claim dated 6 September 2000 that the second and third defendants have breached its copyright in the AW library by reproducing without permission that library or a

substantial part of it. In response, Mr. Paul Hinkley denied these allegations and asserted that he at all material times believed not only that his son held the copyright in AW, but also (and in any event) that PXB was an original work.

I have already given reasons why the first part of the defence to this claim must fail. On the other hand, Mr. Hinkley has in my opinion shown that he was not aware, and had no reasonable grounds for believing, that PXB amounted to an infringing copy of AW. It is true that he understood that the former was designed to do much of the work intended for the latter. This circumstance, however, establishes nothing more than that Mr. Hinkley knew that PXB was an expression of the same idea or ideas as those which lay behind AW. In my opinion, he had no reasonable grounds for believing that the one infringed the copyright of the other. I accept his evidence (T. 2754) that he understood PXB to be "an independent creation", its preparation being consistent with his desire "to make a clean start". It follows that Mr. Paul Hinkley is entitled to whatever protection is, in these circumstances, accorded to him by s.116(2)(b) of the Copyright Act. I will, if necessary, hear counsel further on the extent of the protection thus given.

That protection, in my opinion, does not extend to Mr. Adam Hinkley. He must have been aware of the extent to which PXB was an infringing copy of AW. It follows that he could not have held any reasonable belief of the kind to which the relevant provision refers.

The defendants have issued various counterclaims. Mr. Adam Hinkley filed an amended Counterclaim in the Hotline proceeding on 24 July 2000. He alleges that as a result of a fraudulent misrepresentation regarding the \$500,000 investment, he lost the opportunity to exploit the Hotline and AW software elsewhere, which, he says, would have made "in excess of \$3 million". He seeks relief mirroring that sought by Hotline Communications (i.e. a declaration that he owns the software, delivery up of materials, an injunction, orders relating to the maintenance of confidentiality and an account of profits). These claims must be dismissed, for the reasons already given.

Mr. Hinkley also claims for accommodation and living expenses totalling \$12,000 incurred when in Canada and \$34,833.31 (\$40,833.31 owed less \$6,000.00 received) for lost salary for the period August 1997 to the end of February 1998. In a Reply and Defence to Counterclaim dated 31 July 2000 and filed 3 August 2000 Hotline Communications in summary: denies the allegations as to fraudulent misrepresentation; alleges that Mr. Hinkley formally resolved with his fellow directors of Hotline Communications that they would receive a salary of no more than CAN\$2,000 per month until Hotline



Communications was no longer having difficulty in attracting capital, and otherwise denies any other agreement with Mr. Hinkley for the payment of a specified salary; and pleads that Ontario, Canada is the appropriate jurisdiction for determining the validity of the Shareholders' Agreement and the matters raised in the counterclaim. Further, in submissions Hotline Communications contends that Mr. Jason Roks, whose statements Mr. Hinkley relies upon, was not authorised to speak on behalf of Hotline Communications.

The issue of alleged arrears in salary again demonstrates Mr. Hinkley's misconception of the reality of the corporate structure. He continues (when it suits him) to speak of himself as either an employee or a consultant to Hotline Communications without acknowledging his role as major shareholder, director and President of the company (on other occasions, when it suits him, he speaks of the company as his own). It was not a question of the plaintiffs agreeing to pay him a certain salary; rather, it was a question of him agreeing with his fellow directors to pay himself and others a certain salary having regard to the economic realities facing the company at that time. Just as he would expect to reap the rewards once (or if) the company started to make a profit, so too he had to share the burden during the start up period when the company was struggling. Moreover, he elected to leave Hotline Communications in circumstances which made his future involvement practically impossible and which resulted in the decision of the Ontario Court (General Division) to formally sever his involvement in Hotline Communications.

No evidence was led by Mr. Hinkley about any agreement with Hotline Communications regarding reimbursement for living and travel expenses. The evidence about his salary was scarcely more satisfactory. He simply seized upon loose statements made by Mr. Roks, a person of no relevant standing or authority in Hotline Communications, and put these forward as constituting an enforceable agreement between himself and that company for the payment to him of a specified salary. Other evidence, however, supports the company's position as expressed in its pleading of 31 July 2000: Mr. Hinkley joined with his fellow Hotline Communications directors in agreeing to accept by way of their initial remuneration a maximum of CAN\$2,000 per month. I accept this evidence. I also find (on the basis of Mr. Hinkley's counterclaim) that the sum of CAN\$6,000 was received by Mr. Hinkley for a period which is the equivalent of three months. This, of course, does not equal the period of his association as a software programmer with Hotline Communications. It is uncertain what position the parties take about the balance of that period. I will hear further argument on this point if necessary. That said, however, Mr. Hinkley appears to have no other basis for relief under the head of salary, living and travel expenses. With the above caveat, this cluster of claims, too,

must therefore be dismissed.

The jurisdiction of this Court to determine the matters presently in controversy is raised by Hotline Communications by way of defence to Mr. Hinkley's counterclaim. Since that company has acknowledged the jurisdiction of this Court to determine the matters raised by it in its statement of claim, it cannot change its position when forced to defend a counterclaim in which those same matters, together with related matters, are in issue. In any event, the Canadian Court has found that the Shareholders' Agreement is valid and determined that Mr. Hinkley's shareholding should be cancelled. I do not propose to revisit those issues; nor is such consideration necessary for the purposes of determining the issues before me.

Mr. Paul Hinkley and Meta Consultants also filed a Supplementary Defence and Counterclaim in the Hotline proceeding on 22 June 2000. This document is rather garbled; it includes allegations that can only be brought by Adam Hinkley such as misrepresentations inducing him to enter the Shareholders' Agreement, breach of the Shareholders' Agreement and alleged mismanagement of Hotline Communications leading to a breach of fiduciary duty by Mr. Page. It also makes claims relating to matters such as the death of Mr. Hinkley's daughter (who, of course, was Adam's sister). The latter circumstance clearly involved profound hurt and loss for Mr. Hinkley and his son, to say nothing of the others affected by the tragedy. It and the other allegations to which I here refer are nevertheless irrelevant to the issues in dispute. Relevantly, however, the pleading does allege that Hotline Communications misrepresented to the second and third defendants that Meta Consultants would be unrestrained in its use of the AW library "other than for the development of the Internet software" and that it has unlawfully restrained Meta Consultants from using that software. The defendants also complain that Meta Consultants has been prevented from using PXB. The counterclaim then purports to claim losses of \$25,012,000 that can only be claimed (if at all) by Mr. Adam Hinkley. A separate claim totalling \$2,830,000 is made on behalf of the second and third defendants. Given my conclusions in relation to both the AW and PXB libraries, this counterclaim must fail.

In the Redrock proceeding Mr. Paul Hinkley initially made a claim in his Supplementary Defence filed 27 July 2000 for losses of \$500,000 said to arise from Redrock's "opportunistic" and "vexatious" action. This was struck out by me with leave to file a further amended pleading. In the further amended Defence filed on 29 August 2000, Mr. Hinkley simply sought costs under the heading "Counterclaim". I should point out that ordinarily costs will "follow the event" - namely, they will be awarded to the party who succeeds - and are not

sought by way of counterclaim. I have found that as against the second and third defendants the allegations brought by Redrock for breach of fiduciary duty and the Corporations Law have not been made out. I have found, however, that those defendants technically breached Redrock's copyright in the AW library, although they did so innocently. I further find that these defendants did breach the plaintiffs' copyright by using PXB (which did contain an infringing reproduction of the AW library). I will take all these findings into account on the question of costs, which I will determine after the parties have had an opportunity to consider these reasons for judgment and made appropriate submissions to me. ---

[1] [1952] 1 T.L.R. 101

[2] [1973] 1 All E.R. 241

[3] op. cit. at 111

[4] (1986) 160 C.L.R. 16, at 27 per Mason, J. and at 36-37 per Wilson and Dawson, JJ.

[5] (1982) 149 C.L.R. 337

[6] [1974] A.C. 235 at 261

[7] [1976] 1 W.L.R. 989 at 995, per Lord Wilberforce

[8] [1971] 1 W.L.R. 1,381 at 1,383-1,384

[9] [1916] 2 Ch. 601 at 608

[10] (1917) 23 CLR 49 per Isaacs J at 52

[11] (1999) 75 ALJR 1435

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