

Attachment 3.

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COPY

**Attention: Mr A. N. Abbott**

Dear Tony

**Re, AMC v Hamilton**

I refer to our meeting on 14 January 2010 and to the document called, "Questions for Counsel" prepared by Dr Keung which you forwarded to me before the meeting.

I have reviewed the questions and I confirm my oral response to you as follows (referring to the numbering in Dr Keung's document):

1. The question misconceives the obligation of confidence. The obligation arose in contract and in equity. The obligation was not limited in equity to the "Territory".
2. I agree only Mr Wait gave "expert" evidence for AMC on this issue. I put expert in quotation marks because Mr Wait was called as a witness of fact with expertise, rather than as an expert *per se*. In any event, my recollection is that I never saw a "report" from another "expert". There were notes floating around, but they were far from sufficient for evidentiary purposes and to comply with the expert witness guidelines. Absent a complying report, no other evidence was available to be used.
3. As to the decision not to call Dr Keung on these issues, having had two lengthy discussions with Dr Keung on the issue of the confidential information, I formed the view that if he was re-presented on this issue he would have given evidence which tended to suggest that the use (his Honour found, misuses) of the confidential information was deliberate. This might have exposed Dr Keung to personal liability and would have exposed AMC to aggravated damages. If I am correct in this forensic assessment, then it would have weakened other aspects of the intellectual property claims. As it was, AMC won these claims and Dr Keung avoided personal liability. In any event, I discussed with Dr Keung whether or not he should give evidence. I advised him not to give evidence and I understood him to accept my advice. Given the Judge's findings about evidence Dr Keung did give, I believe the forensic decision was a correct one.
4. I have re-visited the transcript that Dr Keung refers to. It appears to me that he has mis-read the transcript. The exchange that he refers to occurred to on the hypothecation that the case as

- pleaded by Hamilton was sufficient (my principal argument was that the pleading was insufficient) and then a comparison of AMC's position as distinct from Dr Keung's ability to be ready for a trial. I refer you to the transcript of the same date (30 May 2008) at T 9/24 – 31.
5. The Reply Submissions are a contentious issue. You will recall that AMC's first position was that I was not to start work on them, then I was to the minimum possible and finally there was even a suggestion that no Reply submissions be undertaken at all. In the end, we did the best we could in limited time and with minimal resources. The copyright issue was not addressed in writing for these reasons and others. Orally, the copyright submission was addressed in reply, notwithstanding the comment made at [581] of the Reasons (reproduced in Dr Keung's document). This is clear from [582] of the Reasons (which address an oral application to amend made in addresses on the contingent basis of any concern the Court might have had as to the pleaded "reproduction case"). As to this latter case, I have advised in respect of the merits of a possible appeal.

I understand Dr Keung is aggrieved by the Court's findings, particularly the credit findings. I also understand that he now feels we could have done more. Unfortunately, the time to devote the resources and money to the case was before trial. This was not done. In the circumstances, and especially in relation to the effort that was put in by solicitors and Counsel, including in obtaining, I say immodestly, frankly amazing result on the issue of costs, it is very unfortunate more was not done pre-trial.

Three final matters need to be addressed.

First, I continue to get unsolicited correspondence from Dr Keung. I am of course bound by the Bar Rules not to answer his inquires directly, but I would be grateful if you could convey to him that this is not done out of a lack of respect.

Secondly, I note that my last two fee notes have not been paid in full. As you are aware, I am not obliged to accept any further instructions until my fees are paid. I regret to advise that I intend to take this course until my outstanding fees are paid.

Thirdly, I have copied this correspondence to Anne Barnett because Dr Keung's document was directed to Counsel and she might have a different view to my own. However, I have not consulted with Anne to make this response. Also, her fees are a matter for you and her, directly, and I do not intend this letter to in any circumscribe that process.

Yours sincerely,

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cc. *Ms. A. Barnett, Christopher Legoe Chambers*