

Construction
Case Law Update
Rosling King LLP



Background

In the recent case of Signature Realty Ltd v Fortis Developments Ltd, the Court confirmed that an architect's drawings, which were used to obtain planning permission, qualified for copyright protection and that use of those drawings without permission could constitute copyright infringement. In this article we review the findings in that case and propose some steps which property developers can take to avoid infringing copyright law.

The claimant developer exchanged contracts to acquire office buildings in Sheffield with the intention of converting them into student accommodation. The claimant developer instructed an architect to prepare design drawings and planning permission was subsequently obtained. In accordance with usual practice, the planning permission stipulated that the development was to be constructed in accordance with the architect's drawings.

The claimant developer was unable to complete on the acquisition of the site which was ultimately acquired and developed out by the defendant. The defendant instructed its own architects and carried out and completed the development in accordance with the planning permission, subject to two minor material amendments. The claimant, who had obtained an assignment of the benefit of the copyright in the original architect's drawings, brought a claim against the defendant for copyright infringement in connection with the defendant's marketing of the site, development and construction of the site in accordance with the planning permission.

Decision

A key requirement for something to be protected by copyright is "originality" which requires that the work in question is created through the author's/designer's own skill, judgment and effort. The defendant was found to have used the original architect's drawings but maintained that the drawings did not fulfil the "originality" requirement. This argument was quickly dismissed by the Court and the defendant was reminded that the bar for "originality" is a low one.

The defendant also argued that because it had paid a premium to acquire a site with planning consent, there was an implied licence in place to use the original architect's drawings. The Court also dismissed this argument: the claimant, in whom the benefit of copyright was vested, never acquired the site and the grant of a copyright licence by what was essentially a third party, could not be implied.

On the issue of infringement itself, the Court compared the original architect's drawings to those prepared by the defendant's architects and looked at whether they were sufficiently similar and/or whether a substantial part of the original architect's drawings were reproduced in the new drawings. Whilst not all of the new drawings were deemed to have infringed the copyright in the original architect's drawings, the claimant was largely successful and the Court held that there existed sufficient similarities between the two sets of drawings to constitute "copying" and there was therefore an infringement.

Commentary

Purchasers of sites which benefit from planning permission should not assume that on completion of their acquisition they have a right to develop the site in accordance with existing plans. This case highlights the need to be particularly careful where the seller of the site is not the party who instructed the existing plans to be drawn up. If the claimant in this case had in fact acquired the site and subsequently sold it to the defendant, the defendant's submissions in relation to the grant of an implied copyright licence would have been much more persuasive before the Court.

Property developers should ensure that they check the copyright position in any pre-existing plans prior to purchasing a site which benefits from planning permission to avoid a risk of copyright infringement if the intention is to use the pre-existing plans to develop the site. Developers must also remember that remedies for copyright infringement include injunctive relief which could bring development works either temporarily or, in the worst case scenario, permanently, to a halt.

Rather than rely on the possibility of an implied licence to use any pre-existing plans or have completely new plans drawn up, developers should consider obtaining an assignment of the benefit of copyright from the author of the pre-existing plans, an express licence from the author of the pre-existing plans granting the right to use the copyrighted material for permitted purposes or a transfer from the seller of the site of an existing express licence granted by the author of the pre-existing plans in favour of the seller.

The availability of an assignment, an express licence or a transfer of an existing express licence will ultimately depend on the parties involved and the specific circumstances of the site acquisition. Dealing with copyright issues at an early stage during the site acquisition due diligence will help ensure that developers protect themselves from future copyright infringement claims and allow them to focus on commencing and completing the development works.

For further information, please contact [Jonathan Hyndman](#) or the Partner with whom you usually deal.