

The trial judge, Kelly J., found that the Envoy Series Two plans were "an original artistic work" under the Copyright Act, the copyright of which vested in Ownit and the draftsman. However, he found that the copyright had not been infringed because there was no "reproduction" of the Ownit plans or a substantial part thereof. This latter finding was the subject of the appeal. The owners also appealed on the findings that the drawings were an artistic work and that Ownit and the draftsman were owners of the copyright.

The Court found that the house as depicted in the plans and the elevations, sketched and photographic, had no very innovative or exceptional features. It was conceded by Ownit that no great originality, in the common sense of the word, was displayed in the design of the house. Neither was there any originality, in the same sense, in the designs from which the Envoy Series Two was derived.

The Court found that the constituent parts of the house design, which were not novel, did not preclude the draftsman's work being characterised as "original". Neither did the fact that the Envoy Series Two plan had evolved from previous designs of the author prevent the plans from being original. The Court recognised sufficient "skill and judgment" of the draftsman to characterise his work as original.

The trial judge found, without expressly stating his findings, that the owners had copied the plans. However he also found that there had been no substantial reproduction of the plans.

Counsel on behalf of the draftsman argued that the trial judge did not attach sufficient weight to the finding that the owners had copied the plans. There was such strong evidence of copying by the owners so as to support an inference that there had been copying. Such an inference, would go to emphasize the significance of any evidence of similarity between the "copy" and that which had been "copied". Accordingly, the trial judge, should have given added weight to the similarities between two sets of plans, and attached lesser weight to any dissimilarity between them. In support of this argument, counsel relied upon the dicta of Wilson J. in *S.W. Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466, 484.

The Court considered that in *Hart's* case the Judges of the High Court did no more than cite the element of copying as supporting their pre-determined view on resemblance. Accordingly, even though the trial judge, in this case, did not make an express finding on the question of copying but considered, in the first instance, the issue of substantial resemblance, the Court was not prepared to accept that the trial judge had erred in his decision.

In other words, the Court decided that it was acceptable to examine the objective question of similarity between the two plans before the subjective question of copying.

The Court supported the trial judge's finding that the alleged infringing work adopted no more than the concept and idea behind the copyright work and as such did not amount to a breach of copyright.

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16. Cross Examination Of A Court Appointed Referee

This question was considered in *Chloride Batteries Australia Limited v Glendale Chemical Products Pty Limited* Supreme Court of New South Wales Commercial Division Cole J. 16 December, 1988. An order had been made for a reference to an arbitrator or referee under Part 72 of the Supreme Court rules. The question referred to the expert was for enquiry and report. The claim was for damages allegedly resulting from the supply of sulphuric acid by the defendants to be used in electrical accumulators supplied by the plaintiff for use in power stations within New South Wales. The expert was asked to enquire and report on, inter alia, whether the chloride concentration of the batteries caused or contributed to the damage. In addition to reporting on that matter, the expert set out in his report an hypothesis as to what may have been the cause of the battery corrosion. This was of course not the subject of the original enquiry, as directed by the Court. The plaintiff sought an order that the expert's report be rejected and that the expert be the subject of cross examination and that the Court should hear further evidence from the experts.

His Honour said that it was clear that a Court should not automatically adopt a report received. The Court has a discretion whether it will permit further evidence in relation to the question referred for enquiry and report. The Court will have regard to the futility of a process of re-litigating an issue determined by the referee in circumstances where parties have had the opportunity to place before the referee such matters as they desire. It will also have regard to cost. If the report shows a thorough analytical and scientific approach to the assessment of the subject matter of the enquiry, the Court will have a disposition towards acceptance of the report, for to do otherwise would be to negate the purpose of and the facility of referring complex technical issues to independent experts for enquiry and report. The Court may be more hesitant in its disposition, if the parties have not been given an opportunity to place such evidence and technical reports as they may wish before the expert. The decision to adopt, reject or vary a report must always be determined in accordance with perceived justice.

Cole J. decided that, because the plaintiffs had the opportunity of placing material before the expert, the expert had prepared a thoroughly logical and detailed report, the requirements of justice had been met and he declined the plaintiff's application to reject the report and to cross examine the expert. The hypothesis advanced by the expert was not necessary to his conclusion nor did it form part of it.

- **Philip Dawson, Partner, Clayton Utz, Solicitors, Sydney.**

17. Delay Costs Due To Changes Of Programme

An extremely important decision was handed down in August 1988 by the Court of Appeal of the Supreme Court of New South Wales concerning the right of a subcontractor to recover costs including delay costs when a builder alters a construction programme during the course of the project. The decision is *Graham Evans & Co. Pty Ltd v SP Formwork Pty Ltd*. Appeal No. 363 of 1987, 30 August