

Copyright In Display Home - Alleged Infringement - Points of Similarities and Differences - Measure of Damages

Dixon Investments Pty Ltd v K Hall & V Hall, Federal Court of Australia, Lockhart, Spender & Ryan JJ, 3 September 1990.

This was an appeal from a single Judge of the Federal Court. The appeal was brought by Dixon Investments Pty Ltd ("the builder"). The appeal was brought against a decision that there had been no infringement of copyright in respect of a display home constructed by the builder and also the comments made by the trial Judge in relation to appropriate damages if there had been a breach.

The builder had a display home erected. The display home was depicted in certain plans which were part of advertising material produced by the builder. Mr & Mrs Hall ("the owners") arranged for a draftsman to prepare a plan for the construction of a home based upon the builder's display home and the advertising material.

The trial Judge concluded that there had been no breach of copyright by the owners. In coming to this conclusion the trial Judge considered the following:

1. The builder's display home was a basic home which was essentially a rectangle with rooms arranged in it in a particular way.
2. There were only a limited number of ways in which rooms could be arranged within a rectangular framework and still be workable.
3. There were some distinct similarities between the display home and the owner's home. There were also some distinct variations between the two.
4. There were sufficient differences of genuine character in the house constructed by the owners compared to the display home for there not to be a breach of copyright.

The Appeal Court dismissed the builder's appeal and upheld the trial Judge's decision. The Appeal Court confirmed that in considering the question of similarities and differences the number of points of similarity or points of difference was not the determining factor. It is the quality of the similarity or difference which will determine whether or not there has been a breach of copyright. Even though the trial Judge set about analysing the matter by identifying various points of difference and similarity it was apparent that the trial Judge also had regard to the quality of the similarities and differences in coming to his decision.

The trial Judge, notwithstanding that he concluded there was no breach of copyright, went on to make comments in relation to the damages which would have been awarded had there been a breach of copyright. The trial Judge, and the builder's counsel on appeal, identified the

following alternative bases for assessing damages:

- (i) The licence fee likely to be charged for the use of the plan;
- (ii) Damages consequent upon a flagrant infringement of copyright;
- (iii) Damages to take into account the loss in value of the builder's copyright;
- (iv) The architect's fee which would have been incurred to prepare original plans;
- (v) The difference in cost between the amount actually paid to a draftsman to modify the basic plan and the amount which would have been paid had a draftsman prepared original plans.

The trial Judge rejected the assessment of damages on all of these bases. His Honour considered that the appropriate damages would have been \$50.00.

The Appeal Court considered that His Honour's assessment was too low. The Appeal Court appeared to be attracted to the difference in the cost of having a draftsman prepare original plans and the costs actually incurred. It was noted that a draftsman would charge between \$500.00 and \$1,000.00 to prepare an original plan but charged \$200.00 to prepare the offending plan. The Appeal Court considered an appropriate measure of damages at \$500.00.

- **Phillip Greenham, Partner, Minter Ellison, Solicitors, Melbourne.**