

Insights

MORAL RIGHTS: WHY SHOULD DEVELOPERS CARE?

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SUMMARY

Question: What do the Oslo Picasso murals “The Seagull” and the “The Fishermen” and the Dutch De View Jaargetijden have in common?

Answer: They both have been subject to recent high cost, high profile litigation that dragged on for years and which concerned moral rights.

Yes “moral rights” caused all the trouble for these projects – not its more famous cousin, copyright which many regard as the chief culprit for construction IP disputes. Interestingly, moral rights don’t even get a mention in the commonly used standard form contracts such as JCT, NEC and FIDIC and yet they can often be a critical risk issue for many construction projects.

If not adequately addressed in the contract at the outset, or if the passage of time leads to them being overlooked in subsequent transactions, infringement of these rights can expose a developer to potential claims. And because in England, there is scant case law, any dispute or litigation that involves moral rights exposes the parties to real uncertainty as to what the outcome may be.

This blog, the second in our series on IP issues for construction projects, takes a closer look at moral rights – what they are, how they are commonly dealt with contractually and how they may come into play on construction projects.

What are moral rights?

“Moral rights” refers collectively to a number of rights that are concerned with an author or artist’s relationship to a particular literary or artistic copyright work and its intrinsic value, rather than the straightforward transactional or economic value of the work. They are personal rights of the author or artist (in relation to the work), rather than property rights, and generally speaking they cannot be transferred (along with the work) to another party. However they will stay with (and transfer with) the work and continue to vest in the originating author or artist.

Under English law, these rights are governed by the Copyright, Designs and Patents Act 1988 (Act). From a developer's perspective, the key moral rights are:

- The right of an author of a literary or artistic copyright work to be identified as the author (paternity right);
- The right for an author of such a work not to have it subjected to "derogatory treatment" (integrity right); and
- The right of a person not to have the authorship of a literary or artistic work falsely attributed to them.

It is worth noting that an architect's moral rights in relation to a building constructed to a design are treated differently from the architect's moral rights in the design documents. This is explored further in Practical Law's practice note on moral rights but the key points to note are:

- If an architect owns copyright in the plans for a building, the architect has the right to be identified as the author on the building itself. But if multiple buildings are constructed to the same design the architect's right to be identified as the author is limited to the **first** building.
- Identification of authorship must be by appropriate means visible to persons entering or approaching the building, for example, a plaque naming the architect by the building's entrance.
- In the case of a model for a building, the architect's moral right to object to derogatory treatment is infringed by issuing to the public copies of a graphic work representing, or a photograph of, a derogatory treatment of the work.
- Where the building itself is the subject of derogatory treatment, the architect's moral rights are limited to requiring removal from the building of the architect's identification as author.

Contractual solutions

Standard practice is for developers to ask the author of a literary or artistic copyright work (be it a plan/design for a site or a sculpture to be located at a site) to waive their moral rights in relation to that work and this can be documented appropriately in the contract. There are various drafting approaches that can be taken, for example some suggestions are included in Practical Law's Standard document, Waiver of moral rights. The key points to note under the Act include:

- Any of the moral rights may be waived by a written instrument by the person giving up the right (and developers should typically always look to obtain such a waiver, when commissioning a site-specific artwork).
- A waiver by one joint author does not impact the rights of all joint authors.

- Such waivers can be conditional or unconditional and may be expressed to be subject to revocation.
- If a waiver is made in favour of the owner of a related property right, the waiver is presumed to extend to its licensees and successors in title, unless a contrary intention is expressed.

It goes without saying that whether (and on what terms) the author will agree to such waiver will be project and party specific. However, a good starting point for a developer is to ensure inclusion of a moral rights waiver in its template documents at the outset.

Negotiations may be more extensive, for example, when dealing with landmark properties or the acquisition of a property which includes a large scale sculpture and either: (i) the artist retained significant rights when the relevant sculpture was acquired by the property owner; or (ii) it is not possible to establish whether the moral rights were waived as the acquisition or commission of the work took place prior to the current owner acquiring the property on which the artwork is located.

It is therefore critical that the parties engage with these issues at the beginning of the project and agree a position.

Moral rights on construction projects

We consider two scenarios where moral rights may come into play on construction projects.

A developer has acquired a site with a large sculpture in the entrance courtyard. It wants to remove it, but will have to disassemble it to do so. There are no details confirming ownership of the sculpture but the artist is clearly identified and attributed with authorship on a plaque. Planning consent documents relating specifically to the sculpture were lodged by the previous site owner with the local authority but they do not specify ownership of the sculpture nor a commissioning contract.

Here, without knowing who owns the artwork, the new owner of the site is potentially exposed to liability for derogatory treatment of the work if the work is cut up and removed without artist consent. It may also be infringing the actual owner's property rights in the work (for example, if the artist had retained ownership of the work, and it had merely been leased to the site owner).

A claimant may bring an action for a breach of statutory duty, with damages and injunctive relief being available as remedies. However, as it is notoriously difficult to assess damages in this context, injunctive relief will be the most important remedy available to claimants.

When commissioning an artwork for a specific site, a developer should consider:

- Whether it wants to acquire the work or merely lease it for a specified period. While owning the artwork might give more flexibility, ownership does not grant the developer rights in the copyright (unless it also obtains an express assignment of copyright in the work, which is not commonly given by an artist). Where a work is leased, the artist will typically require that its

consent is required in respect of key usages and maintenance of the work and failure to obtain such consent will be a breach of contract.

- How it wishes to make use of the artwork (for example, does it wish to include images of the artwork in its marketing materials or in any other company materials?). To do so would usually require the permission of the artist, if the moral rights have not been waived, and would also require the artist to be credited as the author of the work, every time an image of the work is used. Unless the artist waives its moral right of attribution, it will also be necessary to ensure the artist is identified as the author on the sculpture itself (or nearby).

When acquiring a site that has certain artworks located at it:

- Ensure proper due diligence is conducted, to check: (i) who has title to the artwork; (ii) details of the extent of any moral rights waiver; (iii) if the work is leased, what is the extent of the permission to use the work and when will consent of the artist be required; and (iv) whether there have been any prior dealings with the artist which may show its willingness to work with a site owner in respect of an artwork (and review any documents detailing these dealings).
- If the relevant documents relating to the artwork have been lost or are not available for any reason, check the Land Registry or local authority planning decisions to see if any evidence of the commercial arrangements relating to the artwork can be found.
- If it is possible to identify the artist, check whether images of the artwork feature on the artist's website (or that of its agent or gallery) and whether any indication as to ownership is given there.
- If the artist has retained ownership of the work, it is unlikely the artist will have waived his or her moral rights. This will usually mean a developer's right to make changes to the location of the artwork will be limited, and may require prior consent of the artist. The developer may also have to bear the costs of removal of the artwork (or storage of it offsite if it is removed).
- If moving the artwork (or removing the artwork entirely) it is absolutely critical to ensure that responsibility for obtaining all the necessary consents and/or any liability for any failure to do so remains with the seller, and seek a warranty from the seller in respect of such.

A developer (A) appoints an architect to design a building and obtains a copyright licence but does not obtain a waiver of moral rights in relation to the proposed building and plans. The architect produces a 3D model in preparation for construction of the building. Another developer (B) acquires the site from A, is assigned the copyright licence granted to A, and plans to continue construction.

Here, B must be careful not to infringe the moral rights of the architect. Although the copyright licence granted to A has been assigned to B, the moral rights remain with the author even if it

assigns copyright or grants a copyright licence. This could be particularly important for developers working on large scale projects where architects are reluctant to grant copyright licences.

- In the case of a work of architecture in the form of a building or a model for a building, or a sculpture or a work of artistic craftsmanship, the author has the right to be identified whenever the work itself, copies of a graphic work representing it, or a photograph of it, are issued to the public. Note also that the issue of such copies will often also amount to commercial publication of the work.
- The author of a work of architecture in the form of a building (as noted above) has the right to be identified on the building as constructed. However, usefully from a developer's point of view, this right is limited to display of the identification on the original construction and not subsequent reproductions of the design.

Final thoughts

Ignore moral rights at your peril. As the scenarios demonstrate, they can crop up in various ways and if the parties have not engaged as to how they should be dealt with, havoc may well ensue. Remember that the key is to have the appropriate discussions at the beginning of a relevant project and ensure the contractual documents record the agreement reached. Another effective way of dealing with the issue of moral rights is to anticipate or identify where and when they are likely to be relevant (and with whom) and cover-off the desired position when drafting the contracts at the outset.

Postscript

Just in case you were wondering what happened with the Oslo Picasso murals and the Dutch De View Jaargetijden:

- **Norway:** Two murals, "The Fishermen" and "The Seagull", drawn by Pablo Picasso and sandblasted on to the walls of an Oslo building in collaboration with Carl Nesjar over a period of ten years have recently been torn down by the Norwegian government. Nesjar's daughter, Gro, is attempting to prove that the murals were a collaboration between Picasso and Nesjar in order to establish moral rights in the pieces and seek relief from the Norwegian government.
- **The Netherlands:** Here, the Supreme Court recently ruled on a case where the architect of a building, "De View Jaargetijden" built in 1973, sought to stop a developer making architectural changes to the building in 2015. Although in this case the architect was unsuccessful and the developer was able to change the building, the court process spanned a number of years and is likely to have been decided differently if the court had considered that the change proposed by the developer would damage the architect's reputation.

This article was co-authored with Trainee Solicitor Karl Jones.

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